87-766

No.

In the Supreme Court of the United States

October Term, 1987

BLAIR and JULIA CUNNINGHAM, Administrators of the Estate of Kathleen B. Cunningham, Deceased; and all others similarly situated,
Petitioners

vs.

INSURANCE COMPANY OF NORTH AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Where the *prior* decisions of Your Court, **and** the Pennsylvania Supreme Court, **and** the Pennsylvania class action Rules of Civil Procedure, **and all** applicable state and federal case law unequivocally hold, *without exception*, that the filing of a class action lawsuit *suspends* or *tolls* the statute of limitations from the time of commencement *until* the Court refuses to certify the class or revokes a prior certification, and thousands of estates in the Commonwealth of Pennsylvania rely upon this established principle of law, did the Pennsylvania Supreme Court's contrary *ad hoc*, retroactively applied, totally unprecedented, and unpredictable decision in this case *violate due process and equal protection requirements* warranting review by Your Court because of the *thousands* of estates that otherwise will lose *millions* of dollars of Pennsylvania *statutorily mandated* no-fault benefits?

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IN THE SUPREME COURT OF THE UNITED STATES

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vs.

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Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Richard C. Angino respectfully presents this Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

The Opinion of the Pennsylvania Supreme Court, filed August 14, 1987, Pa. , 430 A.2d 407 (1987) appears in the Appendix attached hereto. The Opinion of the Pennsylvania Superior Court, 353 Pa. Superior Ct. 146, 509 A.2d 377 (1986), also appears in the Appendix attached hereto. The Opinions of the Dauphin County Court of Common Pleas to No. 995 S 1984, September 10, 1984, and to No. 995 S 1984, dated February 22, 1985, both unreported, appear in the Appendix.

JURISDICTION

The Supreme Court of Pennsylvania entered its Order reversing the decision of the Pennsylvania Superior Court on August 14, 1987. This Petition for Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

Pennsylvania Rules of Civil Procedure 1701(a):

> As used in this chapter
>
> "Class action" means any action brought by or against parties as representatives of a class *until* the court by order refuses to certify it as such or revokes a prior certification under these rules. [Emphasis supplied.]

(A copy of Pennsylvania Class Action Rules appears in Appendix.)

STATEMENT OF THE CASE

The Pennsylvania No-Fault Motor Vehicle Insurance Act, 40 P.S. §1009.101, *et seq.*, passed by the Pennsylvania Legislature in 1974 and effective in 1975, was an idealistic, humanitarian experiment dedicated to the concept of providing the "maximum feasible restoration" for the victims of motor vehicle accidents. 40 P.S. §1009.102. The No-Fault Act relied *almost exclusively upon the good faith and fiduciary relationship of an insurer and insured* to provide the required prompt, *non-adversarial* payments. As the Transitional Procedures for notice required, each policyholder in Pennsylvania was informed:

> You will not need a lawyer to collect your No-Fault benefits. If you are injured [contact your insurance company or your insurance agent] to get claims forms. You should be paid within thirty days after the company receives completed forms from all related parties (you, your employer, the hospital, etc.).

31 Pa. Code §66.4.

In order to insure that lawyers would not be necessary, the Legislature required that any rejection be done in writing and follow strict guidelines and timetables:

> An obligor who rejects a claim for basic loss benefits shall give to the claimant written notice of the rejection promptly, but in no event more than thirty days after the receipt of reasonable proof of the loss. Such notice shall specify the reason for such rejection and inform the claimant of the terms and conditions of his right to obtain an attorney.

40 P.S. §1009.106(a)(5).

One of the benefits provided for under the Pennsylvania No-Fault Act was a $15,000 maximum work loss benefit

(more if an Added Benefits Endorsement was purchased). After the No-Fault Act was passed, *virtually all* insurers in Pennsylvania took the position that while a *living* injured victim might qualify for work loss, a *deceased victim* was not entitled to work loss benefits. Although the No-Fault Act became effective in 1975, it was not until 1979 that the first Pennsylvania Appellate Court considered the issue of decedents' entitlement to work loss benefits.

In 1979, the Pennsylvania Superior Court *with only one dissent*, and *in 1980*, the Pennsylvania Supreme Court *unanimously* interpreted the Pennsylvania No-Fault Motor Vehicle Insurance Act to require no-fault carriers to pay work loss benefits *to decedents' estates. Heffner v. Allstate Insurance Company*, 265 Pa. Superior Ct. 181, 401 A.2d 1160 (1979), *aff'd*, 491 Pa. 447, 421 A.2d 629 (1980) and *Pontius v. United States Fidelity & Guaranty Company*, No. 80 March Term, 1978, (Pennsylvania Superior Court, unreported), *aff'd*, 491 Pa. 447, 421 A.2d 629 (1980).

Prior to 1979 and 1980, virtually *no* Pennsylvania insurers paid decedent work loss benefits, filed written rejections, or advised possible claimants as to their rights to benefits or to attorneys. *Even after the Superior and Supreme Court decisions in 1979 and 1980*, the non-payment, non-rejection, non-notice practice continued. Decedents' estates were paid "work loss" benefits generally *only if they had lawyers who knew their rights under Heffner, supra, and Pontius, supra.*

In 1977, the Pennsylvania Supreme Court promulgated a class action Rule of Civil Procedure implementing Your Court's decision in American Pipe & Construction Company v. State of Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), *reh. den.*, 415 U.S. 952, 94 S.Ct. 1477, 39 L.Ed.2d 568 (1974).

> (a) As used in this chapter
>
> "Class action" means any action brought by or against parties as representatives of a class *until* the

> court by order refuses to certify it as such or revokes a prior certification under these rules.

Pa. R.C.P. 1701(a). [Emphasis supplied.]

Subsequent to 1977, it appeared unequivocal to any student of the law that the *filing* of a class action lawsuit *tolled* the statute of limitations on the claims of all persons who would be members of the plaintiff class if the action were certified as a class action.

In 1979, shortly after the first Pennsylvania appellate court decision establishing the entitlement of decedents to work loss benefits, *in anticipation of a potential future statute of limitations defense and relying upon Pa. R.C.P. 1701(a) and applicable case law at the time*, plaintiffs' counsel commenced a class action lawsuit on behalf of potential claimants against INA and thirty other insurance carriers that wrote the bulk of automobile insurance in Pennsylvania. *Nye v. Erie Insurance Exchange*, No. 5349 S 1979 (C.P. Dauph.). The class action Complaint comported with all of the technical requirements of the class action rules. The defined class of plaintiffs was:

> The class of plaintiffs includes all previously employed Pennsylvania residents who were insured by any of the defendants under No-Fault insurance coverage and who sustained a fatal injury within the past two years or whose estate or relatives received any no-fault payments whatsoever as a result of decedents' death during the past two years and their executors, administrators, relatives, etc.

Nye, supra, Complaint at paragraph 14. [See Appendix.]

During the first year and a half of the *Nye* action, there were substantial pleadings and exchanges of paper between plaintiffs and the thirty-one carrier-defendants. On *February 4, 1981*, preliminary objections based upon the lack of standing of Mr. Nye, whose decedent was an Erie insured, to sue the other thirty insurance companies were sustained by the

lower Court. *Up until that time*, there was no refusal to certify or revocation of a prior certification.

On December 10, 1982, the ***Superior*** *Court reversed the Trial Court, holding that Mr. Nye had standing to sue all thirty-one insurance companies as representative of a class of all similarly situated administrators and executors of deceased victims of motor vehicle accidents insured by the thirty-one defendants and denied post-mortem work loss benefits.* 307 Pa. Superior Ct. 464, 453 A.2d 677, 679 (1982).

> [O]ur recent decision in Freeze v. Donegal Mutual Insurance Company, 301 Pa.Super. 344, 447 A.2d 999 (1982), leads us to the conclusion that justice and judicial economy will be served by allowing Nye to maintain a class action suit. The Freeze decision clearly allows an estate to recover work loss benefits; thus, Nye and the other class members are entitled to the benefits they seek to obtain in this suit. If Nye is not permitted to maintain this suit all the class members would be forced to file individual suits to vindicate their rights. To thrust numerous members of a class into separate actions would be an intolerable waste of judicial resources when the claims of all plaintiffs may be expeditiously settled in one suit. Class actions can be a fair and efficient method of resolving disputes and to subject the parties and the court system to the hazards and expenses of separate litigation in this context would eviscerate the purpose of the class action as a "procedural device designed to promote efficiency and fairness in the handling of large numbers of similar claims." Lilian v. Commonwealth, 467 Pa. 15, 21, 354 A.2d 250, 253 (1976).[1] [Footnote omitted.]

Nye v. Erie Insurance Exchange, 307 Pa. Superior Ct. 464, 467, 453 A.2d 677, 678 (1982).

On *December 30, 1983, more than four years after the commencement of Nye*, the Pennsylvania *Supreme* Court reversed the *Superior* Court and dismissed all defendant in-

surance companies except Erie from the action. *Nye v. Erie Insurance Exchange*, 504 Pa. 3, 470 A.2d 98 (1983).

Since *Nye* could not be used as a class action vehicle to recover no fault work loss benefits for the Cunningham Estate and other INA insured decedents, plaintiffs commenced the instant class action on March 29, 1984, *less than three months following* the Pennsylvania Supreme Court's reversal of the Superior Court in *Nye*.

Similar actions were brought against most of the thirty-one defendants sued in *Nye*. *Up until the Supreme Court's decision in the instant case,* a number of individual and class actions relying upon *Nye* tolling were *certified and/or settled* with thousands of Estates getting millions of dollars, *e.g.*, *Saunders v. Erie Insurance Co.*, No. GD 80-9011 Civil Division (C.P. Allegheny); *Bromfield v. Erie Insurance Exchange*, 3604 Civil 1984 (C.P. Cumberland); *Yandrich v. Aetna Casualty & Surety Co.*, No. 2184 S 1982 (C.P. Dauph.); *Spezio v. The Hartford Insurance Co.*, No. 3486 S 1983 (C.P. Dauph.); *Young v. Donegal Mutual Insurance Co.*, No. 4293 S 1983 (C.P. Dauph.); *Sipel v. Commercial Union Insurance Co.*, No. 2187 S 1982 (C.P. Dauph.); *Kraft v. Allstate Insurance Co.*, No. 2557 S 1984 (C.P. Dauph.); and *Gregory v. Harleysville Mutual Insurance Co.*, No. GD 83-05012 (C.P. Allegheny).

There are, however, many other class actions involving *thousands* of additional *identical* Estates owed *millions* of dollars who will *not* recover if the Pennsylvania Supreme Court's decision is upheld. The *only* distinction between the two groups is the *former employed knowledgeable lawyers* who were aware of the impropriety of the insurance industry's actions and brought suits to recover benefits or the Estates were part of settling class actions, while the *latter did not know of their rights, or relied upon Nye tolling.*

It is beyond dispute that Kathleen B. Cunningham, Deceased, was a member of the class as defined in *Nye*. Kathleen Cunningham was involved in a motor vehicle acci-

dent on January 26, 1979, that resulted in her death on January 26, 1979. Kathleen was a Pennsylvania resident, twenty-two years-old and employed as a school teacher. She was the named insured on an INA Pennsylvania no-fault automobile insurance policy. Her parents, Mr. and Mrs. Cunningham, notified INA of the accident shortly after its occurrence. INA paid both funeral and survivor's loss benefits. However, INA gave no written notice of rejection of the Cunningham's claim for work loss benefits as is required by the No-Fault Act, 40 P.S. §1009.106(a)(5).

The Trial Court held that the *Nye* class action did *not* toll the statute of limitations for the Cunningham estate or for other deceased insureds of INA. By Opinion and Order dated February 22, 1985, it revoked class certification and granted defendant's Motion for Summary Judgment against the Cunningham Estate. The Pennsylvania *Superior* Court *unanimously* reversed in a series of cases, including *Kruth v. Liberty Mutual Insurance Company,* 346 Pa. Superior Ct. 147, 499 A.2d 354 (1985); *Miller v. Federal Kemper Insurance Company,* 352 Pa. Superior Ct. 581, 508 A.2d 1222 (1986); *Turner v. Pennsylvania National Mutual Insurance Co.,* 357 Pa. Superior Ct. 644, 513 A.2d 1082 (1986); *Rickert v. Maryland Casualty Insurance Company,* 357 Pa. Superior Ct. 643, 513 A.2d 1081 (1986); *Kraft v. Allstate Insurance Company,* 354 Pa. Superior Ct. 316, 511 A.2d 1356 (1986); and the instant action, *Cunningham v. Insurance Company of North America,* 353 Pa. Superior Ct. 146, 509 A.2d 377 (1986).

The Pennsylvania *Supreme* Court granted defendant INA's Petition for Allowance of Appeal. At *oral* argument in *open* Court, the members of the Pennsylvania Supreme Court asked no questions of INA counsel, and many left their seats at the bench to converse with each other during *defense* counsel's presentation. When the attorney for the Cunninghams and the class began his argument before the Pennsylvania Supreme Court, one member of the Pennsylva-

nia Supreme Court stated that plaintiffs' counsel *had perverted a perfectly good Rule of Civil Procedure defining a class action*. Another asked whether Mr. Nye, the representative plaintiff in *Nye v. Erie*, supra, *had authorized* plaintiffs' counsel to file a class action against thirty-one insurers, rather than an individual action against Mr. Nye's decedent's insurer only. Another Justice of the Pennsylvania Supreme Court muttered under his breath, but loud enough to be heard in the Court room, repeatedly "Scurrilous!" Finally, one Justice of the Pennsylvania Supreme Court asked plaintiffs' counsel *how much money he had made* from the various class action lawsuits brought against no-fault insurers to force them to pay the benefit to which our Pennsylvania Legislature and appellate courts had held deceased victims of motor vehicle accidents entitled.

By Opinion and Order dated August 14, 1987, the Pennsylvania *Supreme* Court held that the previously filed *Nye v. Erie* class action did *not* toll the statute of limitations for the insureds of the defendants in that action, including INA. *Although acknowledging that under the applicable Pennsylvania Rule of Civil Procedure, Pennsylvania appellate court decisions, and United States Supreme Court decisions*, the filing of a class action **usually** tolls the statute of limitations, the Pennsylvania Supreme Court held that in this **particular** case, that *general* rule did not apply. By this **ad hoc,** unprecedented, and *retroactive* change in the law that could not have been anticipated, the Pennsylvania Supreme Court denied due process and equal application of the law to thousands of decedent estates that *justifiably relied* upon *Nye* for the *four year period* while it proceeded through the Pennsylvania Courts. Those Estates were suddenly deprived of millions of dollars of Pennsylvania legislatively mandated no-fault benefits. Carrier-defendants in dozens of other class actions immediately withdrew offers of settlement, cut off negotiations and/or filed Motions to Decertify pending class actions.

Rather than weighing the Legislative goal of maximum feasible restoration to the victims of motor vehicle accidents of the No-Fault Act, insurers' flagrant violations of that Act, and thousands of claimants' entitlement to post-mortem work loss benefits, the Pennsylvania *Supreme* Court decided this case *in an arbitrary manner* in direct conflict with its own rule of Court, its decisions in other cases, and decisions of *Your* Court. The Pennsylvania Supreme Court stated:

> *In the instant case*, it is to be noted that counsel for the Cunninghams is the *same* counsel as filed the class action in *Nye*, and in the *Nye* complaint there appears an *admission* that counsel's purpose in bringing suit against thirty-one insurance companies even though he represented an insured of only one of them was that *he sought to toll the statute of limitations for all carriers, inasmuch as counsel believed that many potential plaintiffs would not otherwise act upon their rights.* We regard such an action as *a clear abuse of the goals of class action procedures. The procedures do not exist to sanction what would be regarded by many as a course of officious intermeddling on the part of counsel, who, motivated by concern for plaintiffs who would not otherwise file suits, has embarked on a course of initiating litigation on behalf of those who have slept on their rights. Indeed, this case presents a most compelling example of tactics employed to subvert the legislative intent embodied in the statute of limitations, and the rules governing tolling will not be extended to give effect to such tactics.*

Slip Opinion at pp. 10-11. [Emphasis supplied.]

Although *all* of *Your* Court's decisions on the matter, the Pennsylvania Supreme Court's prior pronouncements on tolling, virtually all federal and state decisions from other Courts, and the Pennsylvania class action tolling rule require tolling under the factual circumstances of this case, thousands of estates will lose their rights by the Pennsylva-

nia Supreme Court's **ad hoc,** unprecedented decision unless Your Court grants review.

Although the Cunninghams and the class did not explicitly argue their *constitutional* claims of due process and equal protection below, since the arbitrary and retroactively applied decision of the Pennsylvania *Supreme Court* in this matter could not have been anticipated based on the extensive precedent from both the Pennsylvania appellate courts and Your Honorable Court, Your Court has jurisdiction to review this case. *Brinkerhoff-Faris Trust & Savings Company v. Hill, Treasurer and Ex-Officio Collector of Henry County, Missouri,* 281 U.S. 673 (1930).

Moreover, as Your Court has cogently stated:

> Whatever springes a State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. . . . If the Constitution and laws of the United States are to be enforced, this Court cannot accept as final the decision of the state tribunal as to what are the facts alleged to give rise to the right or to bar the assertion of it even upon local grounds.

Davis v. Wechsler, 263 U.S. 22, 24 (1923).

Moreover, "[i]t is not of moment that the State has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of state power which we are asked to scrutinize." *N.A.A.C.P. v. Alabama,* 357 U.S. 449, 463 (1958).

REASONS FOR THE ALLOWANCE OF THE WRIT

The decisions of both Your Court and the Pennsylvania Supreme Court, virtually all federal and state decisions of other Courts, and the Pennsylvania class action rules *unequivocally* hold that the filing of a class action lawsuit *suspends* the statute of limitations from the time of commencement *until* the Court refuses to certify it or revokes a prior certification. Therefore, the Pennsylvania *Supreme* Court's contrary reversal of the *Superior* Court violates due process requirements by deciding this case on an *ad hoc* basis and by unconstitutionally discriminating against thousands of estates who *relied* upon tolling.

The class action Rules of Court adopted by the Pennsylvania Supreme Court in 1977, Pennsylvania Rules of Civil Procedure 1701, *et seq.*, unequivocally detail the tolling effect of class actions. Rule 1701 states:

> (a) As used in this chapter
>
> "Class action" means any action brought by or against parties as representatives of a class *until* the court by order refuses to certify it as such or revokes a prior certification under these rules. [Emphasis supplied.]

The Explanatory Note that accompanied the Pennsylvania Supreme Court's promulgation of Rule 1701 in 1977 stated:

> Subdivision (a) defines "Class Action" to include any action brought by or against parties as representatives of a class until the court refuses to certify it as such or revokes a prior certification.
>
> This definition follows language in Bell v. Beneficial Consumer Discount Co., 465 Pa. 225, 348 A.2d 734

(1975), that "when an action is instituted by a named individual on behalf of himself and a class, the members of the class are more properly characterized as parties to the action. A subsequent order of a trial court allowing an action to proceed as a class action is not a joinder of the parties not yet in the action. The class is in the action until properly excluded."

This definition becomes important in determining the effect of the commencement of a class action as tolling the statute of limitations as to the members of the class other than the named representatives. It carries into effect the decision of the United States Supreme Court in American Pipe and Construction Co. v. State of Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), in which the Court held that the commencement of an action as a class action suspends the applicable statute of limitations during the interim period from commencement until refusal to certify as to all putative members of the class who would have been parties if the action had been certified as such.

(A copy of Pennsylvania Class Action Rules appears in Appendix.)

As if to underscore the tolling effect on the statute of limitations of the filing of a class action Complaint, the Pennsylvania Supreme Court dealt with this issue in the case of *Alessandro v. State Farm Mutual Automobile Insurance Company,* 487 Pa. 274, 409 A.2d 347 (1979). In that case, the Pennsylvania Supreme Court reiterated:

Unlike a case where parties are joined, all members of a class action are "parties plaintiff" upon the filing of the complaint. When the defendant successfully moves for decertification, the decertified parties are "put out of court" as to the class action. This order is final. Lee v. Child Care Services, 461 Pa. 641, 337 A.2d 586 (1975), and the decertified class members may then pursue their actions on an individual basis. They will not be

> time barred by the statute of limitations, as it is suspended during the time they are allegedly parties to the class action. American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974).

Alessandro, supra, 409 A.2d at 350 n. 9.

Neither Rule 1701 *nor* other pronouncements of the Pennsylvania Supreme Court *contain limitations or exceptions* to the tolling effect of a class action Complaint. The foundation of Rule 1701(a), *American Pipe* tolling, rests on the recognition of the indisputable fact that *the social utility of class actions would be lost if class members could not rely upon the existence of a class action suit to protect their rights*.

The wording of Rule 1701(a) is clear and free from ambiguity. However, *for the first time* in the *instant* action, the Pennsylvania Supreme Court has grafted *an exception* onto this rule *that results in thousands of claimants who relied upon class action tolling being denied recovery of millions of dollars of statutorily mandated no-fault benefits* and for those thousands to be treated arbitrarily differently because of lack of knowledge or reasonable reliance.

Such judicial procedure is in direct conflict with statutory rules governing the interpretation of statutes in Pennsylvania and elsewhere which generally hold:

> When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.

1 Pa. C.S.A. §1921(b).

Further, the Pennsylvania Supreme Court's decision in the instant action denying the tolling effect of a previously-filed class action is in direct conflict with Your Court's pronouncement in *American Pipe*, supra, and its progeny. *American Pipe* involved an attempt at timely intervention into a pending class action by individuals who have been

potential class members in an action denied certification because of lack of numerosity. Your Court held:

> In the present case the District Court ordered that the suit could *not* continue as a class action, and the *participation* denied to the respondents because of the running of the limitation period was *not membership* in the class, but rather the *privilege of intervening* in an individual suit pursuant to Rule 24(b)(2). We hold that in this posture, at least where class action status had been denied solely because of failure to demonstrate that 'the class is so numerous that joinder of all members is impracticable,' the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. . . .
>
> *A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure.* Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable. . . . *We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.*
>
> This rule is in no way inconsistent with the functional operation of a statute of limitations. . . . [S]tatutory limitation periods are 'designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence

has been lost, memories have faded and witnesses have disappeared. . . .'

. . . .

Since the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute. . . .

American Pipe, supra, 414 U.S. at 553-556, 94 S.Ct. at 765-767 (1974). [Emphasis added.] [Footnotes and citations omitted.]

Although the specific holding of *American Pipe* was based upon the denial of class certification because of the lack of numerosity, the general statements and supporting arguments go far beyond the limited holding. Throughout the Opinion, Your Court acknowledges the *reliance* of potential members on the class action protecting their claims. *Further, Your Court emphasizes the existence of adequate notice to the defendant. The lack of notice is the principal rationale for the statute of limitations defense.*

Your Court had the occasion to more recently reaffirm, rediscuss, and expand on *American Pipe* in the case of *Crown, Cork & Seal Company, Inc. v. Parker*, 462 U.S. 345, 103 S.Ct. 2392 (1983). *It should be noted that Your Court chose to ignore any limiting language present in American Pipe* when it held:

The American Pipe Court recognized that *unless the statute of limitations was tolled by the filing of the class action, class members would not be able to rely on the existence of the suit to protect their rights.* Only by intervening or taking other action prior to the running of the statute of limitations would they be able to ensure that their rights would not be lost in the event that class certification was denied. Much the same inefficiencies would ensue if American Pipe's toll-

ing rule were limited to permitting putative class members to intervene after the denial of class certification. *There are many reasons why a class member, after the denial of class certification, might prefer to bring an individual suit rather than intervene.*

. . . .

The court noted in American Pipe that *a tolling rule for class actions is not inconsistent with the purposes served by statutes of limitations.* 414 U.S., at 554. *Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights,* see Delaware State College v. Ricks, 449 U.S. 250, 256-257 (1950); American Pipe, 414 U.S., at 561 (concurring opinion); Burnett v. New York Central R. Co., 380 U.S. 424, 428 (1965) but *these ends are met when a class action is commenced. Class members who do not file suit while the class action is pending cannot be accused of sleeping on their rights; Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims.*

. . . .

We conclude, as did the Court in American Pipe, that '*the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action.*' 414 U.S., at 554. *Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied. At that point, class members may choose to file their own suits or to intervene as plaintiffs in the pending action.*

Crown, Cork & Seal, supra, 462 U.S. at 350-354, 103 S.Ct. at 2395-2397. [Emphasis added.]

Since Your Court's decision in *American Pipe,* supra, the tolling effect of the filing of a class action has been repeatedly

considered and universally affirmed. Denials based upon lack of standing make no difference. In *Haas v. Pittsburgh National Bank, et al.*, 526 F.2d 1083 (3d Cir. 1975), the United States Court of Appeals for the Third Circuit held:

> On appeal, *plaintiffs do not contest the district court's holding that Haas could not represent the class of Equibank cardholders*, [no "standing"] but rather argue that when Haas filed the original class action complaint on November 13, 1972, the limitations period was tolled for all members of the class Haas *purported to represent*.
>
> Plaintiffs rely on American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), as support for their contention that the amendment of the complaint relates back to the original filing and that their claims against Equibank, therefore, are not barred by the statute of limitations.
>
> . . . .
>
> *Consistent with the limitation, we hold that the commencement of the original class action by Haas tolled the statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action. The amendment of the complaint by the addition of Equibank cardholder Mitchell, therefore, relates back to the initial filing of the complaint on November 13, 1972.*

Haas, supra, at 1096-1098. [Emphasis added.] [Footnotes omitted.]

One year later, the District Court for the Eastern District of Pennsylvania in *Chevalier v. Baird Savings Association, et al.*, 72 F.R.D. 140 (E.D. Pa. 1976) stated:

> An initial issue which must be faced is *whether the filing of a complaint by a plaintiff tolls the statute of limitations against a defendant for all members of the*

> *asserted class even though that plaintiff has no cause of action against the defendant. . . . Thus, under Haas, the filing of the complaint by the Chevaliers on August 11, 1972 tolled the statute of limitations for all mortgagors of the defendants named in the complaint. Nor do we think this is affected by the fact that the Chevaliers were themselves concededly time-barred when the complaint was filed. Whether the named plaintiff cannot proceed as such because he or she has no standing or because he or she is not a member of the class which is purportedly being represented (i.e. has no standing) makes no difference. In both cases the policy of preventing needless interventions in class actions will be served.* See American Pipe & Construction Co. v. Utah, 414 U.S. 538, 553-54, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974). *Similarly the policies behind limitations periods—notice to defendants and prevention of stale claims—are fully served if the class is limited to those whose claims were not time-barred at the time of the complaint, as is being done here. See id.*, 414 U.S. at 553-55, 94 S.Ct. 756; Haas, supra at 1097.

Chevalier, supra, at 154-155. [Emphasis added.] [Footnotes omitted.]

Outside of Pennsylvania there are voluminous precedents expanding *American Pipe* beyond "numerosity" and into other noncertification and/or dismissal areas including lack of standing. *See McCarthy v. Kleindienst*, 562 F.2d 1269 (D.C. Circuit 1977), particularly at 1272, 1274-1275; *Stoddard v. Ling-Temco-Vought, Inc., et al.*, 513 F. Supp. 314 (C.D. Cal. 1981), particularly at 334-335.

> That rationale [tolling] was based upon two essential points: (a) that a contrary rule would inevitably force "passive" (i.e., unnamed) class members to file motions to intervene, in order to protect themselves against the running of a limitations period if class action status was

later denied or terminated—a situation which "would deprive Rule 23 class actions of the efficiency and economy of litigation which is the principal purpose of the procedure," 414 U.S. at 553, 94 S.Ct. at 766; and (b), that the basic policy considerations behind a statute of limitations—"to promote justice by preventing surprises through revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared," 414 U.S. at 554, 94 S.Ct. at 766,—would be satisfied since the filing of a class action within the limitations period would serve to advise a defendant not only of the substantive claims which must be defended, but also of the number and at least generic identity of the persons who have such claims. So long as those two points of rationale are accommodated by the matter at hand—and as the cases indicate, they may be satisfied in a rather wide variety of situations—*I perceive no sound reason for any limitation based upon technical distinctions concerned with why class action was eventually denied or terminated*. I would agree, instead, with the suggestion that the appropriate focus of inquiry here should simply be upon the extent to which the claims asserted in the earlier class proceeding have in fact placed a defendant upon notice of the claims presently at issue. See Comment, The American Pipe Dream: Class Actions and Statutes of Limitations, 67 Iowa L.Rev. 743 (1982).

It is with these thoughts in mind that I examine defendant Rausch's suggestion that American Pipe cannot be applied in a case such as the present one, where the class in question was decertified upon a determination that the class representative lacked "standing" to assert a claim on behalf of the class. In support of that position, Rausch argues that a suit instituted by one who lacks standing is a nullity from the outset—a "nonexistent lawsuit"—citing McClune v. Shamah, 593

F.2d 482 (3d Cir. 1979), and Hobbs v. Police Jury of Moorehouse Parish, 49 F.R.D. 176 (W.D. La. 1970), and accordingly that a class action commenced by one who lacks standing cannot logically function to toll a statute of limitations. I note that both such cases were concerned with intervention situations and held, as have other decisions, that a suit instituted by one who lacks standing cannot be saved by the intervention of a party who has standing, the theory being that intervention is an ancillary proceeding which requires the existence of a properly instituted main suit. But however that may be, *it can hardly be said that a suit commenced by one who lacks standing is in any literal sense a "nonexistent" suit. It may be a defective suit,* subject to a motion to dismiss or perhaps even to the court's dismissal *sua sponte, but it is for all that no less the judicial assertion of a claim, functioning to give a defendant notice of whatever causes of action are asserted therein.* And where such a claim is asserted by way of a class action, and in fact covers the causes of action which a class member himself could properly bring, a defendant has received just as much notice as might have been imparted if the proceeding had been instituted by that class member. In fact, if one were to deal only in generalities, a *class action which is denied or terminated because the class representative lacks "standing" might often be more likely to give a defendant actual notice of the claims of individual class members than one where denial or termination was based upon a lack of "typicality" or "commonality."*

Nor, in my view, is there anything singular or peculiar with respect to "standing" that would generally prevent application of the other consideration expressed in American Pipe—the concern that where the determination to disallow the class action is made upon "subtle factors," a rule "requiring successful anticipation of the

> determination of the viability of the class would breed needless duplication of motions [to intervene]." *Standing questions are ones with which both skilled counsel and skilled courts sometimes experience considerable difficulty, even after extensive discovery and when intimately acquainted with the facts,* as vividly demonstrated by the history of the present litigation itself. I can see no more reason, as a general matter, to require a passive class member to anticipate the existence of and ultimate ruling upon that question than to require him to do so with respect to questions of "numerosity," "commonality" or "typicality."

Rose v. Arkansas Valley Environ. & Utility Auth., 562 F. Supp. 1180, 1192-1193 (W.D. Mo. 1983). [Emphasis added.]

Plaintiffs' class action counsel relied upon Rule 1701 and *all* of the previously-mentioned case law in bringing the *Nye* class action. There was also a reliance upon the generally accepted legal principles that rigid "standing" requirements apply *only* to *federal* courts and cases because of the constitutional "case or controversy" requirement. Obviously, there was a similar reliance for four years upon these rules and case law, including the Pennsylvania Superior Court's unanimous reinstatement of *Nye* in the instant case.

Not only is the decision in the instant action diametrically opposed to the decisions in other Pennsylvania Supreme Court cases, Your decision, and other federal court cases, but it overrules a series of recent Pennsylvania *Superior* Court decisions that correctly hold that the filing of the *Nye* class action tolled the statute of limitations against all defendants named in the *Nye* class action. The *Superior* Court specifically rejected the insurer's arguments that because the representative plaintiff in *Nye* lacked standing, *Nye* was a *nullity* and *ineffective* to toll the statute of limitations:

> We conclude that a class action commenced by a representative plaintiff who lacks standing is sufficient to toll

> the statute of limitations for the purported members of the class who later file their own actions so long as the original action provided the defendant with adequate notice of the substantive nature of their claims and the number and generic identities of the potential plaintiffs who might assert them.[4] In the instant case, the Nye action provided Kemper with timely notice of the nature of the Millers' claim, i.e., for post-mortem work loss benefits on behalf of their deceased daughter. [Footnote omitted.]

Miller v. Federal Kemper Insurance Company, 352 Pa. Superior Ct. 581, 594, 508 A.2d 1222, 1229-30 (1986). *See also, Rickert v. Maryland Casualty Company*, 357 Pa. Superior Ct. 643, 513 A.2d 1081 (1986); *Turner v. Pennsylvania National Mutual Insurance Company*, 357 Pa. Superior Ct. 644, 513 A.2d 1082 (1986).

Although the Pennsylvania *Supreme* Court states in its Opinion that *it was clear* **when** the *Nye* Complaint was filed that Mr. Nye *did not have standing* to sue any insurance company but his own (and presumably thousands of estates should not have relied upon it for any tolling effect), such a presumption would require potential class members to obtain, read, understand and predict *accurately* when and if a class action Complaint might be dismissed to benefit from the tolling rules. Even that would not have helped in the instant case. Although the Trial Court dismissed the *Nye* Complaint on the basis of the lack of standing, the Superior Court held *unanimously* that *Nye* plaintiff *had standing* and could pursue the action as a class action.

With the above decision from the Superior Court, with no refusal of certification with the clear language of the Pennsylvania class action rules and case precedent, it is inexplicable how the Pennsylvania Supreme Court could have determined that the Nye class action did not put insurers on notice of claims of class members and/or that potential class

members should not have relied upon Nye for any tolling effect.

The Supreme Court's ruling also *arbitrarily* results in *two* classes of citizens being treated differently because of lack of knowledge or reliance. Defendant and other carriers do not contend that, *but for the statute of limitations defense,* they would owe thousands of Estates millions of dollars and that these uncompensated Estates are *arbitrarily being treated differently* than other Estates who had knowledgeable lawyers or who had been paid in other settled class actions. Their sole defense to payment is the Pennsylvania Supreme Court's denial of statute of limitations tolling by the *Nye* class action.

Doubtless it is true that "statutory limitations periods are 'designed to promote justice by preventing surprises. . . .' " (emphasis added). Order of *Railroad Telegraphers v. Railway Express Agency,* 32 U.S. 342, 348, 88 L.Ed. 788, 64 S.Ct. 582 (1944), cited with approval in *American Pipe,* supra, 414 U.S. at 554. *Nye* put the thirty-one insurance companies sued *on notice* of their class action claims. Even though the initial claim in *Nye* was dismissed by the lower Court *on a standing basis,* the dismissal was *reversed by the Superior Court. Potential claimants obviously felt their interests were protected by Nye and, consequently and understandably, refrained from instituting their own suits even if they knew about their rights.*

Defendant cannot contend that it was lulled into inaction by plaintiffs' sleeping on their rights and bringing suit *only after* years have passed, memories dimmed, and potential witnesses lost. On the contrary, defendant was *specifically* sued on behalf of potential class members in *Nye.* No basis exists *morally or legally* for defendant to be relieved of its *legislatively* mandated duty by *a statute of limitations defense.*

The truth of the matter is that in the no-fault area, the potential class members—*not the defendant*—were talked or lulled into a false sense of security by the action or inaction of the defendant. Unsophisticated in the law, lay relatives in most cases turned to the insurance carriers who did not tell the decedents' relatives about their possible right to recover decedent work loss benefits. This failure on the part of defendant INA, violated the spirit and letter of the law and serves as an added basis for following the tolling principles pertinent to this case.

Furthermore, Section 106(a)(5) of the No-Fault Act legislatively mandates the duty owed by defendant to all claimants. When a claim for no-fault benefits is rejected, the insurance company has a statutory obligation to provide specific written notice within 30 days:

> (5) An obligor who rejects a claim for basic loss benefits shall give to the claimant written notice of the rejection promptly, but in no event more than thirty days after the receipt of reasonable proof of the loss. Such notice shall specify the reason for such rejection and inform the claimant of the terms and conditions of his right to obtain an attorney.

40 P.S. §1009.106(a)(5).

There can be no question that defendant did not provide such written rejection in this case with respect to the representative plaintiffs and potential class members.

Both at oral argument and in its written Opinion, the Pennsylvania Supreme Court ignored the issues of fairness, justice and citizens' rights, and was preoccupied with what it perceived as "abuse" of the judicial process. Yet, it is the Pennsylvania Supreme Court's decision in this action that represents the abuse. Apparently cognizant of the fact that its decision in this action will effectively preclude utilization of the class action mechanism in Pennsylvania in the future,

the Pennsylvania Supreme Court attempted to limit the precedential effect of this decision by holding:

> The argument has been advanced that, by not applying the tolling principal in the context of this case, the utility of class action suits will be completely vitiated, rendering it necessary in every case for putative plaintiffs to intervene or file their own actions because of an inability to rely on the standing of other representative plaintiffs. Such an argument misconstrues the impact which this decision will have upon the status of class action litigation, for the most direct effect will be to discourage plaintiffs from filing suits in cases where they lack standing, thus reducing the incidence of cases where standing may be questioned.

Slip Opinion at pp. 12-13.

Such an assertion is unsupportable. The Pennsylvania Supreme Court's decision unfavorably resulted in *punishing the innocent class members,* who were *either unaware* of their rights or *relied* upon the tolling law in effect at the time, while at the same time, legitimizing every effort by defendants to ignore the law and deny statutorily mandated citizens' rights.

In his dissent, Justice Larsen notes the majority's preoccupation with plaintiffs' counsel in this matter:

> The majority takes note of the fact that counsel for the appellees herein "is the same counsel as filed the class action in Nye," maj. op. at 10, and concludes therefrom that counsel has acted as an officious intermeddler, abused the goals of class action procedures, and employed subversive tacts. Maj. op. at 10-11. I disagree. I would note for the record that Pennsylvania insurers not only failed to inform their insureds that work loss benefits were available under the No-fault Act, Pennsylvania No-Fault Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, No. 176, 40 P.S.

> §§109.101-1009.701, since repealed, but also contested payment of these benefits in numerous court actions and appeals. See, e.g., Freeze v. Donegal Mutual Insurance Co., 504 Pa. 218, 470 A.2d 958 (1983) (estate of victim entitled to work loss benefits); Klopp v. Allstate Insurance Co., 334 Pa.Super. 162, 482 A.2d 1133 (1984) (decedent on total disability entitled to work loss benefits); Antanovich v. Allstate Insurance Co., 320 Pa.Super. 322, 467 A.2d 345 (1983) (work loss benefits must be paid in lump sum), aff'd, 507 Pa. 68, 488 A.2d 571 (1985); Shomper v. Aetna Life & Casualty Co., 309 Pa.Super. 97, 454 A.2d 1101 (1982) (earlier decisions regarding work loss benefits were to be applied retroactively and such benefits were payable to decedent on welfare at time of accident); Minier v. State Farm Mutual Automobile Insurance Co., 309 Pa.Super. 53, 454 A.2d 1078 (1982) (retired person on pension is entitled to work loss benefits). Thus, counsel's actions were a proper attempt to prevent clear abuses of the No-fault Act by the insurance industry on behalf of the industry's insureds.

Dissenting Slip Opinion at pp. 7-8.

Unknown and unnamed class members, as well as Mr. and Mrs. Cunningham, have the right to have their case decided by a neutral and detached judiciary. As Your Court has stated:

> Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but . . . 'the general law . . .' so that 'every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. . . .'

Hurtado v. California, 110 U.S. 516, 535-36 (1884).

The Pennsylvania Supreme Court never addressed the consummate arrogance of the insurance industry in Pennsyl-

vania that has flaunted for years the legislative mandate of the No-Fault Act, as well as the scores of Pennsylvania appellate decisions that have ordered it to pay post-mortem work loss benefits. In its head-long rush to condemn plaintiffs' counsel, the Pennsylvania Supreme Court's decision in this case retroactively changes the law, *depriving thousands* of claimants of timely claims for a benefit to which they are undoubtedly entitled by law. In the process, those claimants are denied the right to pursue and recover work loss benefits through the arbitrary action of Pennsylvania's highest court. The only distinction between the thousands of Estates who will go uncompensated if the Pennsylvania Supreme Court's decision is upheld and the thousands who have been compensated is that the latter had knowledgeable attorneys and were a part of a settling class, where the former did not know of their rights or engage knowledgeable attorneys or relied upon *Nye* or were unfortunately not insureds of a settling carrier. The Supreme Court of Pennsylvania, in a clearly admittedly *ad hoc* decision, improperly violated established law of class action tolling, and in so doing, deprived thousands of Estates that either were unaware of their rights or relied upon the unequivocal tolling rules, and in so doing, have violated fundamental constitutional rights.

CONCLUSION

The tolling effect of the filing of a class action lawsuit is a part of our judicial process both through the rules of court and federal and Pennsylvania precedent. So are the principles of due process and equal treatment under the law. The decision of the Pennsylvania Supreme Court in this case denying tolling of the statute of limitations to the claims of thousands of class members is in direct conflict with all prior decisions of both Your Court and the Pennsylvania courts. Claimants who have relied for nearly eight years on that tolling are now deprived of the opportunity to recover the benefits to which they are entitled by law by the arbitrary decision of the highest Court in Pennsylvania. Therefore, plaintiffs respectfully request that Your Court grant their Petition for Certiorari. At stake in the due process and equal protection issues of this case is not only the much-acclaimed appearance of justice, but, from the prospective that treats process as intrinsically significant, the very essence of justice.

Respectfully submitted,
ANGINO & ROVNER, P.C.
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APPENDIX

Rule 1701. Definition. Conformity

(a) As used in this chapter

"Class action" means any action brought by or against parties as representatives of a class until the court by order refuses to certify it as such or revokes a prior certification under these rules.

(b) Except as otherwise provided in this chapter, the procedure in a class action shall be in accordance with the rules governing the form of action in which relief is sought.

Explanatory Note—1977

Subdivision (a) defines "Class Action" to include any action brought by or against parties as representatives of a class until the court refuses to certify it as such or revokes a prior certification.

This definition follows language in *Bell v. Beneficial Consumer Discount Company,* 465 Pa. 225, 348 A.2d 734 (1975), that "when an action is instituted by a named individual on behalf of himself and a class, the members of the class are more properly characterized as parties to the action. A subsequent order of a trial court allowing an action to proceed as a class action is not a joinder of the parties not yet in the action. The class is in the action until properly excluded."

This definition becomes important in determining the effect of the commencement of a class action

as tolling the statute of limitations as to the members of the class other than the named representatives. It carries into effect the decision of the United States Supreme Court in *American Pipe and Construction Company v. State of Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), in which the Court held that the commencement of an action as a class action suspends the applicable statute of limitations during the interim period from commencement until refusal to certify as to all putative members of the class who would have been parties if the action had been certified as such.

Subdivision (b), Rule 1701, conforms the practice and procedure except as otherwise specifically provided to the form of action in which relief is sought, which could ordinarily be assumpsit, trespass, equity or declaratory judgment. The exceptions are primarily concerned with the pleadings as provided by later rules.

The rules do not deal specifically with jurisdiction over nonresident members of the class. This issue becomes of importance in view of recent decisions of the United States Supreme Court respecting federal jurisdiction in many types of class actions based on diversity, which must now be brought in state courts.

In *Snyder v. Harris*, 394 U.S. 332, 89 S.Ct. 1053, 22 L.Ed. 319 (1969), and *Zahn v. International Paper Co.*, 414 U.S. 291, 94 S.Ct. 505, 38 L.Ed.2d 511 (1973), the Court held that, in diversity cases and in other cases where statutes impose a jurisdictional amount, claims of individual class members below the minimum cannot be aggregated to meet the jurisdic-

tional requirement. Each member's claim must separately qualify.

In *Klemow v. Time, Incorporated*, 466 Pa. 189, 352 A.2d 12 (1976), certiorari denied, 429 U.S. 828, 97 S.Ct. 86, 50 L.Ed.2d 91 (1976), an action nominally brought on behalf of all subscribers to Time magazine, the court in footnote 15 stated that "because the jurisdiction of the courts of the Commonwealth is territorially limited, the class may consist only of Pennsylvania residents. The class may also include nonresidents who submit themselves to the jurisdiction of the state courts".

This holding would require nonresidents in this type of "national" consumer class action to intervene or to appear through an opt-in procedure which is provided for by Rule 1711(b)(2).

Klemow does not definitely decide the status of nonresidents where the subject matter of the action is a res or fund within Pennsylvania or is an attack on corporate action of a Pennsylvania corporation involving only bondholders or creditors in other jurisdictions. Nor did it involve a situation where Pennsylvania has the most significant relationship to all aspects of the transaction, so that Pennsylvania might assume jurisdiction over non-resident members of the class in a manner parallel to long-arm jurisdiction over nonresident defendants.

Jurisdiction over nonresidents is clearly substantive and not procedural and for this reason is not dealt within the rules.

In the Court of Common Pleas of
Dauphin County, Pennsylvania

CLASS ACTION IN ASSUMPSIT
No. 53495 1979

JURY TRIAL DEMANDED

C. WILLIAM NYE, JR., Individually
and as Administrator of the Estate
of Karen L. Nye, Deceased, and all
others similarly situated,

Plaintiffs

versus

ERIE INSURANCE EXCHANGE;
AETNA CASUALTY AND SURETY COMPANY;
ALLSTATE INSURANCE COMPANY;
AMERICAN STATES INSURANCE COMPANY;
CNA INSURANCE COMPANY;
COMMERCIAL UNION ASSURANCE COMPANY;
DONEGAL MUTUAL INSURANCE COMPANY;
EMPLOYER'S INSURANCE OF WAUSAU;
FIREMAN'S FUND INSURANCE COMPANIES;
GENERAL ACCIDENT GROUP;
HARLEYSVILLE INSURANCE COMPANY;
HARTFORD INSURANCE GROUP;
HOME INSURANCE COMPANY;
INSURANCE COMPANY OF NORTH AMERICA;
KEMPER INSURANCE COMPANY;
KEYSTONE INSURANCE COMPANY;
LIBERTY MUTUAL INSURANCE COMPANY;
MARYLAND CASUALTY COMPANY;
MOTORISTS INSURANCE COMPANIES;
NATIONWIDE MUTUAL INSURANCE COMPANY;

PENNSYLVANIA NATIONAL INSURANCE GROUP;
THE PRUDENTIAL INSURANCE COMPANY OF AMERICA;
ROYAL-GLOBE INSURANCE COMPANY;
SAFECO INSURANCE COMPANY;
SHELBY MUTUAL INSURANCE COMPANY;
STATE AUTOMOBILE MUTUAL INSURANCE COMPANY;
STATESMAN GROUP;
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY;
TRAVELERS INSURANCE COMPANIES;
UNITED STATES FIDELITY AND GUARANTY COMPANY;

Defendants

COMPLAINT

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by an attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that, if you fail to do so, the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAW-

YER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

The Pennsylvania Lawyers' Referral Service
100 South Street
Post Office Box 186
Harrisburg, Pennsylvania 17108
717-238-6715

COMPLAINT

REPRESENTATIVE PLAINTIFFS' CLAIM

1. Plaintiff C. William Nye, Jr., is the father and administrator of the estate of the decedent, Karen L. Nye, and is an adult resident of Dauphin County, Pennsylvania.

2. Defendants, Erie Insurance Exchange, Aetna Casualty and Surety Company, Allstate Insurance Company, American States Insurance Company, CNA Insurance Company, Commercial Union Assurance Company, Donegal Mutual Insurance Company, Employer's Insurance of Wausau, Fireman's Fund Insurance Companies, General Accident Group, Harleysville Insurance Company, Hartford Insurance Group, Home Insurance Company, Insurance Company of North America, Kemper Insurance Company, Keystone Insurance Company, Liberty Mutual Insurance Company, Maryland Casualty Company, Motorists Insurance Companies, Nationwide Mutual Insurance Company, Ohio Casualty Insurance Company, Pennsylvania National Insurance Group, The Prudential Insurance Company of America, Royal-Globe Insurance Company, Safeco Insurance Company, Shelby Mutual Insurance Company, State Automobile Mutual Insurance Company, Statesman Group, State Farm Mutual Automobile Insur-

ance Company, Travelers Insurance Companies, United States Fidelity and Guaranty Company, are insurance companies licensed to write motor vehicle insurance policies in the Commonwealth of Pennsylvania pursuant to the Pennsylvania No-Fault Motor Vehicle Insurance Act, 40 P.S. Section 1009.101 et seq. (hereinafter No-Fault Act).

3. Prior to and on December 21, 1978, decedent Karen L. Nye was insured under an Erie Insurance Exchange Pioneer Family Auto Insurance Policy (copy attached as Exhibit A) which provided for no-fault benefits as mandated by the Pennsylvania No-Fault law.

4. The various other defendants have issued similar policies and provide similar benefits for their insureds.

5. On or about December 21, 1978, at approximately 5:00 p.m. on Pennsylvania Route 322 in Swatara Township, Pennsylvania, plaintiff/decedent was killed in a motor vehicle accident.

6. At the time of her death, plaintiff/decedent, Karen L. Nye, was a staff assistant in the Harrisburg office of Senator H. John Heinz, III, at an annual salary of $9,072.

7. On January 17, 1979, plaintiff requested of defendant, Erie Insurance Exchange, payment of wage loss benefits as provided for under the Pennsylvania No-Fault Act.

8. On January 25, 1979, defendant Erie Insurance Exchange through its counsel, Clyde W. McIntyre, Esquire, denied any claim for lost earnings for a decedent on the basis that "local courts do not recognize" such a claim.

9. On April 16, 1979, plaintiff's counsel advised defendant Erie Insurance Exchange, through its counsel Clyde W. McIntyre, Esquire, that the Superior Court with only one dissent decided that a decedent was entitled to wage losses.

10. Despite the clear opinion of the Superior Court, Erie Insurance Exchange refused to pay the No-Fault mandated wage loss payments.

11. On November 8, 1979, the Supreme Court refused to even hear any appeal from the Superior Court decision permitting decedents' estates to recover for decedents' lost wages.

12. Defendant Erie Insurance Exchange has to date refused to pay the lost wages, accumulated interest, and counsel fees incurred.

WHEREFORE, plaintiff claims damages from defendant Erie Insurance Exchange for the $15,000 maximum wage loss benefits, accumulated interest from January 25, 1979, counsel fees incurred and to be incurred up until the time of final resolution of the matter and punitive damages for blatently [sic] refusing to pay wage loss benefits in the face of a unanimous Superior Court decision on the identical issue.

CLASS ACTION ALLEGATIONS

13. Paragraphs one through twelve of the Complaint are incorporated herein by reference.

14. The class of plaintiffs includes all previously employed Pennsylvania residents who were insured by any of the defendants under No-Fault insurance coverage and who sustained a fatal injury within the past two years or

whose estate or relatives received any no-fault payments whatsoever as a result of decedents' death during the past two years and their executors, administrators, relatives, etc.

15. Plaintiffs aver that the total number of all class members is so numerous that their joinder would be impracticable.

16. Plaintiffs also aver that many of the members of the class are unaware of their rights because of the defendants' actions in refusing to pay such claims or even alerting their insureds as to the possible existence of such claims.

17. It is imperative that the rights of these plaintiffs be protected by a prompt tolling of the Statute of Limitations.

18. The questions of law or fact raised in the instant action are common to all members of the class.

19. Claims of the representative parties are typical if not identical to the claims of the class.

20. The representative parties will fairly and adequately represent the class in that competent counsel has been retained, has no potential or actual conflict of interest with other possible members of the class and can acquire financial resources to insure the interest of the class will not be harmed.

WHEREFORE, plaintiff for himself and the class which he represents, prays this Honorable court to grant judgment against the defendants as follows:

1. To require each defendant to search its respective files and determine the names and addresses of all in-

sureds who have been killed in motor vehicle accidents that occurred within the past two years or in which any payment has been made within the past two years;

2. To order each defendant to immediately pay to each decedent-insured's estate or relatives $15,000 wage loss benefits plus 18% accumulated interest to the time of payment;

3. To require each defendant to pay for the counsel fees incurred in pursuing the instant action;

4. To award punitive damages where appropriate; and

5. To order each and every defendant in the future to promptly pay for wage loss benefits for decedents.

BENJAMIN & ANGINO, P.C.
s/ Richard C. Angino
Attorney for Plaintiffs

November 14, 1979

[Exhibit A omitted.]

Opinion, Court of Common Pleas, Sept. 10, 1984

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW
NO. 995 S. 1984
CLASS ACTION IN ASSUMPSIT

BLAIR AND JULIA CUNNINGHAM,
Administrators of the Estate
of Kathleen B. Cunningham,
Deceased,

Plaintiff

V.

INSURANCE COMPANY OF NORTH
AMERICA,

Defendant

OPINION

On January 26, 1979, Kathleen B. Cunningham died from injuries suffered in an automobile accident. On March 29, 1984, plaintiffs—Kathleen's parents and administrators of her estate—brought suit against defendant, under whom Kathleen was covered, to recover work loss benefits and overdue interest pursuant to Pennsylvania's No-Fault Motor Vehicle Insurance Act, Pa. Stat. Ann., tit. 40, §1009 (Purdon 1984-85 supp.).[1]

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[1] The complaint alleged that plaintiffs' claims for those benefits had been denied by the defendant. Defendant's Answer admitted that plaintiffs' application for benefits stated that two days' work had been lost because of the accident; but defendant asserted that "[n]o further notice of any claim to work loss benefits was given to INA." Defendant's Answer, filed May 7, 1984 at ¶2.

The suit, a class action, also requested that the defendant be required (1) to determine the names of all insureds killed in motor vehicle accidents since the passage of the no-fault act; (2) to pay work loss benefits and overdue interest to each entitled insured's estate or relative; (3) to stack benefits where appropriate; (4) to pay counsel fees; and (5) to promptly pay such benefits in the future.

The pleadings are now closed and plaintiffs have filed a petition for certification of the class as well as motions requesting partial summary judgment and consolidation of similar cases. In addition, two petitioners have requested the court's permission to intervene as additional representative plaintiffs in the class action. A hearing was held on these matters on August 15, 1984. We now hold as follows: plaintiffs' motions for consolidation and partial summary judgment are denied. The petitions to intervene are denied. Plaintiffs' petition for certification of the class is granted; however, plaintiffs are ordered to secure a proper representative plaintiff within 20 days or suffer decertification of the class.

CONSOLIDATION

We address first plaintiffs' motion for consolidation of this case with over a dozen others of a similar nature. The purpose of such a consolidation would be to conserve the time of plaintiffs' counsel, who also acts as counsel in the other cases. However, such a consolidation would create an unmanageable litigation which would be impossible to resolve properly. Plaintiffs' motion is therefore denied.

PARTIAL SUMMARY JUDGMENT

Plaintiffs have also requested that this court enter partial summary judgment in their favor. The request is rather

vague, but our impression of its basis is the same as the impression of defendant's counsel, who stated that "it appears to be a motion that asks the Court to declare that what the Supreme Court has already said to be the law." (N.T. Aug. 15, 1984, hearing, at 52). We agree with counsel's conclusion that such a declaration ". . . is not going to help anyone in this case in any way." (N.T. Aug. 15, 1984 hearing at 52). Plaintiffs' motion is denied.

PETITIONS TO INTERVENE

On April 12, 1984, Alma Kasparek filed a petition as administratrix of the estate of Gerald Kasparek requesting this court's permission to intervene as an additional representative plaintiff. On June 1, 1984, Lillian P. Goll, executrix of the estate of Harriet Hearn Boyles, filed a similar petition. Both petitioners argue that they are clearly entitled to intervene under Pennsylvania Rule of Civil Procedure 2327 (3) and (4), 42 Pa. Cons. Stat. Ann. (Purdon 1984-85 supp.) which provides:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if
>
> . .
>
> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not he may be bound by a judgment in the action.

The petition of Lillian P. Goll must be dismissed, for her decedent's accident occurred on September 2,

1979—more than four years before the present action was filed. As such, her estate is not a member of the class as we define it, and she accordingly cannot properly represent the class.

The petition of Alma Kasparek presents a different question. Her decedent, Gerald Kasparek, died in an automobile accident that occurred on February 19, 1982. At the time of his death decedent was a named insured of Erie Insurance Exchange. Plaintiffs' counsel, who also represented both petitioners, argued that decedent Kasparek was also insured by defendant: "He was a named insured by Erie, but he also had in his residence a son that he was riding with who is insured by the Insurance Company of North America . . . If you would look at their policy, the definition of insured is the named insured, and any relative resident in the home." (N.T. August 15, 1984, hearing at 54). Counsel accordingly argues that coverage by both is proper.

The definitional subsection of the no-fault act, §1009.103, *supra*, defines "Insured" as follows:

> (A) an individual identified by name as an insured in a contract of basic loss insurance complying with this act; and
>
> (B) a spouse or *other relative of a named insured*, a minor in the custody of a named insured, and a minor in the custody of a relative of a named insured *if*—
>
> (i) *not identified by name as an insured in any other contract of basic restoration insurance complying with this act; and*
>
> (ii) *in residence in the same household with a named insured.*

> An individual is in residence in the same household if he usually makes his home in the same family unit, even though he temporarily lives elsewhere.

(Emphasis added). Nonetheless, petitioner's counsel argues, an insurance company is allowed to provide more comprehensive coverage than that required by law. Counsel asserts that such additional coverage was provided by the Insurance Company of North America as is evidenced by its policy which states that an insured includes both named insureds and resident relatives of named insureds. However, defendant argues that the policy must be read as a whole, that it includes a clear and specific exclusion for relatives who have their own insurance, and that therefore the decedent could not claim coverage under the Insurance Company of North America. We agree with defendant and deny petitioner's request here.[2]

CERTIFICATION

We are left with plaintiffs' motion for certification of the class. Pennsylvania's rules governing class actions are found in Pa.R.Civ.P. 1701-1716, 42 Pa. Cons. Stat. Ann. (Purdon 1984-85 supp.) Under Rule 1707 the court is required to hold a certification hearing after the pleadings are closed. The hearing is limited to the class action allegations of the complaint and is not concerned with the merits of the controversy. "Its only purpose is to decide whether the action shall continue as a class action or as an action with individual parties only. In a sense, it is designed to

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[2] See the Exclusions listed on page 1, Exhibit A, of Plaintiffs' Brief, filed August 20, 1984, which plaintiffs assert is a copy of INA's policy. In our opinion it is clear that that policy did not provide the more comprehensive coverage alleged by plaintiffs.

decide who shall be the parties to the action and nothing more." Explanatory Note, Rule 1707, *supra*.

In determining the propriety of class certification the court is guided by Rules 1702, 1708, and 1709. Rule 1702 lists the prerequisites for a class action: (1) the class must be so numerous that complete joinder is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; (4) the representative parties must fairly and adequately assert and protect the interests of the class (the criteria relevant here are listed in Rule 1709); and (5) the class action must provide a fair and efficient method for adjudication of the controversy (the criteria relevant here are listed in Rule 1708).

The burden of proof in a class certification is on the party seeking certification. *Janicik v. Prudential Insurance Co.*, 305 Pa. Super. 120, 451 A.2d 451 (1982); *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12 (1975), cert. denied, 429 U.S. 828 (1976). However, that party is not required to affirmatively prove separate facts establishing each of the requirements of the rules, *Janicik v. Prudential Insurance Co., supra;* instead, he must "sufficiently establish those underlying facts from which the court can make the necessary conclusions and discretionary determinations." *Id.* at 130, 451 A.2d at 455. In addition, when the underlying facts are not in dispute, the court may hold the burden more easily satisfied. *Ablin v. Bell Telephone Co.*, 291 Pa. Super. 40, 435 A.2d 208 (1981). See also, *Bell v. Beneficial Consumer Discount Co.*, 241 Pa. Super. 192, 205, 360 A.2d 681, 688 (1976): "[D]ecisions in favor of maintaining a class action should be liberally made"; and

Esplin v. Hirischi, 402 F.2d 94, 101 (10th Cir. 1968), cert. denied, 394 U.S. 928 (1969): "[I]n a doubtful case. . .any error should be committed in favor of allowing the class action," for the court "may later alter, modify, or revoke the certification if later developments in the litigation reveal that some prerequisite to certification is not satisfied." *Janicik v. Prudential Insurance Co., supra* at 129, 451 A.2d at 455.

To establish numerosity, plaintiffs presented statistics as to the total number of traffic fatalities in Pennsylvania and as to the defendant's market share of the insurance industry. Plaintiffs' calculation based on those statistics—that there would be 408 potentially unpaid estates from 1975-83, with 148 of those estates' causes of action arising in the 1980-1983 time frame—was accepted by defendant for purposes of determining numerosity.

Defendant did not, however, concede the presence of commonality and typicality. Instead defendant argued that those factors are no longer present because the appellate courts have decided the common questions that at one time united the class members (i.e., questions such as the effect of a decedent's minority or lack of dependents on a claim for work loss benefits). Now, defendant argues, all that remain are "individual questions that have to do with entitlement and amount" (N.T. Aug. 15, 1984, hearing at 52); defendant concludes that the case is therefore not proper for certification.

We disagree. Although questions such as those relating to minority and dependency have indeed been resolved by the appellate courts, the question as to whether the defendant is acting in accordance with those resolutions is not resolved. If defendant is in fact so acting, then

the class which we today certify will be so small as to warrant decertification. We cannot reach such a conclusion on the basis of the facts before us now, however, and we are instead satisfied that commonality and typicality exist. Clearly the claim of the representative plaintiffs—a demand for post-mortem work-loss benefits—is typical of the claims of the class members. Common ground among class members is also easily established. All class members' estates evolved from motor vehicle deaths. All involve decedents insured by the defendant. All involve insurance policies with similar if not identical provisions. Similarly, all involve the same statutorily-mandated benefits. Of course there will be some facts unique to each class member; however, for the majority of class members those facts will not outweigh the commonality shared.

We are also convinced that the class action vehicle is a fair and efficient method of adjudicating the controversy. There are several factors listed under Rule 1708, *supra*, that we find relevant in reaching this conclusion. First, we are convinced that common questions of law and fact predominate over most questions involving individual members. We also feel that while the class is large enough to warrant utilization of class action procedure, it is not so large as to be unmanageable. We are not aware of any other litigation commenced by any of the class members,[2] [sic] and we do believe that the amounts sued for ($15,000 plus interest) are significant enough to warrant the cost of this action.

The last criteria for certification is that the representative parties must fairly and adequately assert and protect

[2] Except that the representative plaintiff and the 2 prospective intervenors have petitioned to intervene into at least one other class action, which we have refused.

the interests of the class. Rule 1709, *supra*, requires the court to consider "among other things," (1) whether the attorney for the representative parties will adequately represent the interests of the class; (2) whether the representative parties have a conflict of interest in the maintenance of this action; and (3) whether the representative parties have or can acquire adequate financial resources for the prosecution of the action. We are satisfied that these criteria have been met.

We are, however, troubled by the fact that the representative plaintiffs in this action are administrators of an estate of a person who died on January 26, 1979—over five years before this suit was filed. As such, their claim is barred by §1009.106(c)(1)'s 4-year limitation, and they cannot represent the members of the class.[3] We will therefore grant plaintiffs' counsel 20 days to secure a proper representative plaintiff. If such a plaintiff is not secured, the court will on motion of either party decertify the class.

Although we are granting plaintiffs' request for certification, we will not certify a class dating back to the passage of the No-fault Act. Section 1009.106(c)(1), *supra*, provides in part:

> If no-fault benefits have not been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable diligence should have known, that

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[3] We have already held in *Kruth v. Liberty Mutual Ins. Co.*, 3004 S. 1983 (Dauphin County, Pa.) that the case of *Nye v. Erie Insurance Exchange*, 5349 S. 1979 (Dauphin County, Pa.) did not toll that statute of limitations.

> the loss was caused by the accident, or not later than four years after the accident, whichever is earlier.

The Pennsylvania Supreme Court has construed the No-fault provisions to provide a "rolling" statute of limitations: "the Act clearly looks to a continuing series of losses with each failure of a victim to receive his or her normal financial remuneration for work the victim could have performed had the accident not rendered that victim unable to work." *Kamperis v. Nationwide Insurance Co.*, Pa. , , 469 A.2d 1382, 1384 (1983). Under the *Kamperis* decision an action to recover work loss benefits may be commenced ". . . (a) within two years from any time the victim suffers work loss as a result of the accident . . . ; (b) within 2 years after the victim's accrued work loss equals the maximum amount recoverable under the Act for work loss . . . [;] and (c) not later than 4 years after the accident." *Id.* at , 469 A.2d at 1384. Accordingly, then, after four years a victim's work loss claim is clearly stale; we will therefore only certify a class dating back to March 30, 1980—four years prior to the filing of the present complaint. In accordance with the foregoing we enter the following

ORDER

AND NOW, September 10, 1984, plaintiffs' motions for partial summary judgment and consolidation are denied.

The petitions of Lillian P. Goll and Alma Kasparek to intervene as additional representative plaintiffs are denied.

Plaintiffs' petition for certification of the class is granted, the class to be defined as follows:

Opinion, Court of Common Pleas, Sept. 10, 1984
Order

The class shall consist of the estates of all decedents insured under policies of no-fault insurance issued by Insurance Company of North America whose deaths occurred as the result of the maintenance and use of a motor vehicle within Pennsylvania during the period from March 30, 1980, to final disposition of this action.

The class shall also consist of the estates of all such decedents who were residents of Pennsylvania and who died as the result of the maintenance and use of a motor vehicle outside of Pennsylvania during the period from March 30, 1980, to final disposition of this action.

The class shall further be limited to those estates which have not yet been paid wage loss benefits.

The class shall further be limited to those estates whose decedents did not recover work loss benefits to the amount of $15,000.00 prior to their deaths.

Plaintiffs' counsel is further granted 20 days from this date to secure a proper representative plaintiff to pursue this action on behalf of the class. Failure to do so will result in decertification of the class upon motion of either party.

BY THE COURT:
s/ Warren G. Morgan, Judge

Distribution:

Richard C. Angino, Esquire, Attorney for Plaintiffs
Joseph A. Tate, Esquire, Carl A. Solano, Esquire, Attorneys for Defendant Insurance Company of North America; SCHNADER, HARRISON, SEGAL & LEWIS, Suite 3600, 1600 Market Street, Philadelphia, Pa. 19103

Opinion, Court of Common Pleas, Feb. 22, 1985

IN THE COURT OF COMMON PLEAS
DAUPHIN COUNTY, PENNSYLVANIA

CIVIL ACTION—LAW

CLASS ACTION
IN ASSUMPSIT

NO. 995 S. 1984

BLAIR AND JULIA CUNNINGHAM,
Administrators of the Estate
of Kathleen B. Cunningham,
Deceased,

Plaintiff

VS.

INSURANCE COMPANY OF
NORTH AMERICA,

Defendant

OPINION

The present case is before us on defendant's motions for revocation of class certification and summary judgment. We will grant both.

Certification in the present case was granted on September 10, 1984, but was conditioned upon substitution of the named representatives who were found by this court to be time-barred. Twenty days for such substitution was given; that deadline was later extended pending resolution of a discovery question.

On January 28, 1985, we resolved that discovery question in favor of the defendant and ordered that substitution of a proper representative take place within 20 days.

That substitution has not taken place. Nor have any petitions from prospective intervenors been filed. The class is accordingly without a named party—a vital cog in the class action wheel—and we will grant defendant's motion to decertify the class.

Also before us is defendant's motion for summary judgment with respect to the claim of the named parties.[1] We have already determined the Cunninghams' claim to have been barred by the 4-year statute of limitations of §1009.106(c)(1) of the No-fault Motor Vehicle Insurance Act, Pa. State. Ann., tit. 40 (Purdon 1984-85 supp.). See Opinion of Sept. 10, 1984, at 10. We accordingly enter the following

ORDER

AND NOW, February 22, 1985, defendant's motion for revocation of class certification in the above-captioned action is granted.

Defendant's motion for summary judgment is granted, and the action is dismissed in its entirety.

BY THE COURT:
s/ Warren G. Morgan, Judge

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[1] Counsel for both sides agreed to have this issue determined on briefs. See N.T. Aug. 15, 1984, hearing, at 48.

J. 75017/85

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 174 Harrisburg, 1985

ELEANOR BRUNDA,
Administratrix of the Estate
of Francis J. Brunda,
Deceased; and all others
similarly situated,

Appellant

vs.

HOME INSURANCE COMPANY,

Appellee

Appeal from Order and Judgment of the Court of Common Pleas, Civil Division, of Dauphin County, No. 1141 S 1984.

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 175 Harrisburg, 1985

BLAIR AND JULIA CUNNINGHAM,
Administrators of the Estate
of Kathleen B. Cunningham,
Deceased; and all others
similarly situated,

Appellants

vs.

INSURANCE COMPANY OF NORTH
AMERICA,

Appellee

Appeal from Order and Judgment of the Court of Common Pleas, Civil Division, of Dauphin County, No. 995 S 1984.

BEFORE: WIEAND, OLSZEWSKI and WATKINS, JJ.

OPINION BY WIEAND, J.: FILED MAY 12, 1986

This is a consolidated appeal from orders of the trial court which revoked class certifications previously entered in *Brunda v. Home Insurance Co.*, No. 1141-S-1984 (Dauphin Cty.) and *Cunningham v. Insurance Company of North America*, No. 995-S-1984 (Dauphin Cty.). These actions had sought recovery of post-mortem work loss benefits under Pennsylvania's No-fault Motor Vehicle Insurance Act.[1] The representative plaintiffs in both cases also appealed from judgments dismissing their individual claims on grounds that they were barred by the applicable statute of limitations.

Francis J. Brunda died in an automobile accident on August 15, 1976. At the time of the accident, he was insured by a policy of no-fault insurance which had been written by Home Insurance Company (Home). Home denied the demand by Brunda's wife for work loss benefits. Consequently, on April 13, 1984, Eleanor Brunda commenced a class action against Home to recover work loss benefits on behalf of her deceased husband's estate and also on behalf of the estates of all insureds of Home who had died in auto accidents following enactment of the No-fault Act.

Kathleen Cunningham was the daughter of Blair and Julia Cunningham, who are the appellants at No. 175 Har-

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[1] Act of July 19, 1974, P.L. 489, No. 176, 40 P.S. §1009.101 et seq., *repealed by* Act of February 12, 1984, P.L. 26, No. 11, §8(a), effective October 1, 1984.

risburg, 1985. She died as a result of a motor vehicle accident on January 26, 1979,[2] when the car she had been operating collided with another vehicle. The decedent was covered by a policy of motor vehicle insurance which had been issued by Insurance Company of North America (INA). After INA had refused to pay work loss benefits to the decedent's estate, the Cunninghams filed a class action complaint against INA on March 29, 1984. In it, they sought recovery of work loss benefits on behalf of their daughter's estate and the estates of all other INA insureds who had sustained fatal injuries in auto accidents after 1975 when the No-fault Act went into effect.

In both actions, the insurance companies filed answers to the complaints which alleged, inter alia, that the claims of the representative plaintiffs were barred by the four year statute of limitations contained in the No-fault Act. Later, they moved for summary judgment on this ground. In the meantime, the two estates had filed motions for class certification and also for partial summary judgment on their individual claims. After hearing, the trial court denied appellants' motions for partial summary judgment, but conditionally granted class certification. Although the court determined that the individual claims of appellants were barred by the statute of limitations, it gave appellants' counsel twenty days in which to intervene new class representatives. Failure to substitute new plaintiffs within twenty days, the court warned, would result in decertification of the two classes. Unable to locate an adequate class representative for either action, appellants'

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[2] Although both parties are agreed that the decedent died on January 26, 1979, there is some confusion as to whether the date of the accident was the 25th or 26th of January. The distinction is unimportant for purposes of our analysis.

counsel served interrogatories on the insurance companies and requests for the production of documents to disclose the identity of each insured who had been killed in an automobile accident. Pending responses to these discovery requests, appellants' counsel petitioned the court for more time in which to intervene proper representative plaintiffs. The court granted the petitions and thereby extended the deadline for substituting new plaintiffs until twenty days after appellants' counsel received the insurance companies' answers to interrogatories. Home and INA, however, filed a joint motion for a protective order. They alleged, inter alia, that the information sought by appellants, and in particular the identities of potential class members, was beyond the scope of permissible discovery. The trial court granted the motion for a protective order after hearing, but once again it gave appellants' counsel an additional twenty days in which to intervene proper class representatives. Appellants were again cautioned that if after that time no new plaintiffs had been substituted, the classes would be decertified upon motion. The twenty day period expired without intervention in either action. Therefore, Home and INA filed motions for revocation of the prior class certifications. The trial court granted these motions on February 28, 1985 and February 22, 1985.[3] The court also granted INA's previously filed motion for summary judgment. Subsequent motions for reconsideration of the orders decertifying the classes were denied by the trial

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[3] On the same day that the trial court decertified the *Brunda* action, Brunda, by counsel, filed a motion for hearing on the form and content of notice to be given to the proposed class members. The motion was denied by the trial court. Brunda contends that it was error to refuse a notice hearing. This argument is without merit. As the trial court observed, at the time when the motion was filed the class already had been decertified.

court. Summary judgment was then entered also in favor of Home Insurance Company and dismissing the Brunda claim. The present appeals followed.

Appellants in both appeals raise the same four issues: (1) whether the trial court erred by entering summary judgments against them on the ground that their individual claims were barred by the statute of limitations; (2) whether the court, by virtue of its finding that their claims were time barred, erroneously determined that they were improper class representatives;[4] (3) whether it was error to grant the insurance companies' joint motion for a protective order prohibiting the discovery of the identities of potential class members; and (4) whether the trial court erred by denying their motion for reconsideration of the orders revoking class certification. For the reasons which follow, we vacate the judgment entered against the Cunninghams and reverse the order decertifying their class action. The judgment against Brunda and the order revoking certification of her class action, however, will be affirmed.

"In reviewing summary judgment, the court must accept as true all well-pleaded facts in the non-moving party's pleadings, giving the non-moving party the benefit of all reasonable inferences to be drawn therefrom. To uphold summary judgment, there must be not only an absence of genuine factual issues, but also an entitlement to judgment as a matter of law." *Craddock v. Gross,* Pa. Super. ,

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[4] The Cunninghams also contend that the trial court erred when it denied two petitions to intervene on the ground that the intervenors would have been improper class plaintiffs. Because we hold that the Cunninghams were proper plaintiffs capable of adequately representing the class defined in their complaint, we do not review the propriety of the court's denial of intervention.

, 504 A.2d 1300, 1301 (1986) quoting *Lookenbill v. Garrett*, 340 Pa.Super. 435, 439, 490 A.2d 857, 859 (1985); *Curry v. Estate of Thompson*, 332 Pa.Super. 364, 368, 481 A.2d 658, 659 (1984); *Rybas v. Wapner*, 311 Pa.Super. 50, 54, 457 A.2d 108, 109 (1983). See: Pa.R.C.P. 1035(b). Entry of summary judgment will be reversed where the trial court has abused its discretion or has committed an error of law. *Peters Township School Authority v. United States Fidelity and Guaranty Co.*, 78 Pa.Cmwlth. 365, 370, 467 A.2d 904, 906 (1983).

A claim for post-mortem work loss benefits will remain viable, at the longest, for four years following the occurrence of the fatal accident giving rise to the claim. See: 40 P.S. §1009.106(c)(1). Here, both claimants filed their actions after this statutorily-mandated time period had expired. The Cunningham action was commenced more than five years after the fatal accident of their daughter; and nearly eight years had elapsed following the death of Mrs. Brunda's husband before she filed her suit. Despite this passage of time, appellants contend that their actions are not time barred. The running of the limitations period, they argue, was suspended during the pendency of two previously filed class actions which also had sought recovery of work loss benefits, and which allegedly had included their decedents as members of the represented class. See: *Nye v. Erie Insurance Exchange*, No. 5349-S-1979 (Dauphin Cty.); *Seibel v. Allstate Insurance Co.*, No. 653-S-1981 (Dauphin Cty.).

We addressed the same argument in *Miller v. Federal Kemper Insurance Co.*, Pa.Super. , A.2d (J. 75004/85; filed , 1986). We there held that the anti-trust action of *Seibel v. Allstate Insurance Co., supra*, did not toll the statute of limitations for subsequent as-

sumpsit actions, such as those involved in the instant appeals, which seek recovery of work loss benefits. However, we also decided that *Nye v. Erie Insurance Exchange, supra, did* have the effect of suspending the statute of limitations for work loss claims, but only for the members of the class there defined. The class in *Nye* had been defined to include all previously employed insureds who died in auto accidents after November 15, 1977. Thus, appellants in the instant appeals may benefit from the tolling effect of *Nye* only if their decedents fit within the narrow class defined in *Nye*.

Kathleen Cunningham, who had been employed as a school teacher prior to her death on January 26, 1979, was clearly included in the class described in *Nye*. As a result, the statute of limitations ceased to run against the Cunninghams' claim on behalf of their daughter's estate for as long as the *Nye* action remained extant, i.e., from its commencement on November 15, 1979 until dismissal by the Pennsylvania Supreme Court on December 30, 1983. See: *Miller v. Federal Kemper Insurance Co., supra* at , A.2d at . The decedent's fatal injuries had been sustained less than ten months before the commencement of the *Nye* action, and the estate's complaint was filed within three months after *Nye* had been dismissed. Thus, the total amount of untolled time which elapsed against the Cunninghams' claim was approximately a year. Because the No-fault Act provides a minimum of two years in which to bring an action to recover post-mortem work loss benefits,[5] the Cunninghams' claim remained viable at the time they instituted their present action. The trial court's

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[5] See: *Guiton v. Pennsylvania National Mutual Insurance Co.*, 503 Pa. 547, 550-551, 469 A.2d 1388, 1389 (1983); *Kamperis v. Nationwide Insurance Co.*, 503 Pa. 536, 541, 469 A.2d 1382, 1384 (1983).

conclusion that the Cunninghams' claim was barred by the statute of limitations, therefore, was error.

Unlike the Cunninghams' decedent, Mrs. Brunda's husband, who sustained his fatal injuries on August 15, 1976, does not fit within the class defined in *Nye*. The *Nye* class, as we have observed, was limited to insureds who died after November 15, 1977. Therefore, the statute of limitations continued to run untolled against Brunda's claim for work loss benefits throughout the nearly eight years which elapsed before Eleanor Brunda filed her action. As the trial court correctly concluded, Brunda's claim was time barred.

The trial court's finding that the individual claims of appellants were time barred was the sole basis for its determination that appellants were improper class representatives. The propriety of the court's determination that appellants were improper representatives, therefore, necessarily depends upon the validity of its disposition of appellants' individual claims.

As we have already observed, the trial court erred when it concluded that the Cunninghams' claim was barred by the statute of limitations. It follows, therefore, that the removal of the Cunninghams as class representatives on this ground was also error. In the absence of any other reason for questioning the adequacy of the Cunninghams' representation, we reverse the trial court's order decertifying the class action.

With respect to the *Brunda* action, we agree with the trial court's determination that Brunda could not act as the representative plaintiff for the class of individuals described in her complaint because her action was time barred. To act as a class representative, a litigant must be

a member of the class which he or she seeks to represent. *Janicik v. Prudential Insurance Co. of America,* 305 Pa.Super. 120, 135, 451 A.2d 451, 458 (1982). The purpose of this threshold requirement is "to ensure due process to absent class members and to satisfy requirements of standing." *Id.*, citing *Sosna v. Iowa,* 419 U.S. 393, 403, 95 S.Ct. 553, 559, 42 L.Ed.2d 532, 542 (1975). A plaintiff who does not have a viable cause of action "is not a member of any putative class and is therefore per se unable to serve as class representative." *Wofford v. Safeway Stores, Inc.*, 78 F.R.D. 460, 477 (N.D. Cal. 1978). See: *Pabon v. McIntosh,* 546 F.Supp. 1328, 1333 (E.D. Pa. 1982); *Salgado v. Piedmont Capital Corp.*, 534 F.Supp. 938, 953 (D.P.R. 1981); *Morgan v. Laborers Pension Trust Fund for Northern California,* 81 F.R.D. 669, 677 (N.D. Cal. 1979); *Rossini v. Oglivy & Mather, Inc.*, 80 F.R.D. 131, 134 (S.D. N.Y. 1978); *Turner v. First Wisconsin Mortgage Trust,* 454 F.Supp. 899, 908 (E.D. Wis. 1978). The reason for this rule is wise. What a plaintiff "may not achieve himself, he may not accomplish as a representative of a class." *Mintz v. Mathers Fund, Inc.*, 463 F.2d 495, 499 (7th Cir. 1972). Thus, a plaintiff, such as Brunda, who is without a viable cause of action because she has failed to assert her claim in a timely fashion, cannot qualify as a class representative. *Wiltshire v. Standard Oil Co.*, 447 F.Supp. 756, 757 n.1 (N.D. Cal. 1978), *aff'd in part, rev'd in part on other grounds,* 652 F.2d 837 (9th Cir. 1981), *cert. denied, Standard Oil Co. v. Wiltshire,* 455 U.S. 1034, 102 S.Ct. 1737, 72 L.Ed.2d 153 (1982).

The trial court, having properly discharged Brunda as class representative, nevertheless proceeded to certify Brunda's action conditionally as a class action, even though in Brunda's absence the action was left without a repre-

sentative plaintiff. Although Pa.R.C.P. 1710(d) gives courts the power to certify class actions conditionally, the Rule does not specify in what circumstances conditional certification will be appropriate. Similarly, our judicial decisions have not offered guidance in this regard. Thus, in order to determine whether it was proper to certify the *Brunda* action conditionally, we look to federal decisions which have interpreted the federal counterpart to Rule 1710(d) of the Pennsylvania Rules of Civil Procedure.

The Ninth Circuit Court of Appeals, in *In re Hotel Telephone Charges*, 500 F.2d 86, 90 (9th Cir. 1974), indicated that conditional certification is not a means by which a court, at a certification hearing, can avoid deciding whether the requirements for certification have been met. "The purpose of conditional certification," the Court said, "is to preserve the Court's power to revoke certification in those cases wherein the magnitude or complexity of the litigation may eventually reveal problems not theretofore apparent." *Id*. Similarly, the District Court for the Northern District of California held that absent a preliminary showing that an action may be maintained as a class action, it would be inappropriate to certify a class conditionally on the theory that decertification could be ordered if later discovery disclosed the impropriety of proceeding as a class action. See: *Colburn v. Roto-Rooter Corp.*, 78 F.R.D. 679, 681, 683 (N.D. Cal. 1978). See also: *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975).

To maintain a class action in Pennsylvania, there must be a representative class plaintiff who can establish, inter alia, that his or her claim is typical of those asserted by all members of the class, and that he or she will fairly and adequately protect the class' interests. See: Pa.R.C.P.

1702(3), (4). Instantly, however, the trial court conditionally certified the class action despite the fact that, after Brunda's dismissal as class plaintiff, there no longer existed a representative party to maintain the action. This was error. In the absence of a class plaintiff who could establish the typicality of his or her claim and the adequacy of his or her representation, the action could not proceed as a class action. It was therefore inappropriate for the trial court to certify the class on the condition that it could later order decertification if no new class plaintiffs had been intervened. Although certification should have been denied at the outset, the error in certifying the class conditionally was corrected when the trial court later ordered decertification. In light of our conclusion that the initial certification of the action was improper, Brunda's remaining arguments are moot.

The judgment entered against Eleanor Brunda in appeal No. 174 Harrisburg, 1985, and the order decertifying Brunda's class action are affirmed. The judgment entered against the Cunninghams at No. 175 Harrisburg, 1985, however, is vacated, the order revoking certification of the class is reversed, and the action is remanded for proceedings consistent with this opinion. Jurisdiction is not retained.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Judgment and Order of the Court of Common Pleas of Dauphin County in appeal No. 174 Harrisburg, 1985 are affirmed. The Judgment of the Court of Common Pleas of Dauphin County in the appeal at No. 175 Harrisburg, 1985 is vacat-

ed, the Order revoking certification of the class is reversed, and the action is remanded for proceedings consistent with this opinion. Jurisdiction is not retained.

s/ Mildred E. Williamson
Deputy Prothonotary

Dated: May 12, 1986

[J-107-87]

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 52 Middle District
Appeal Docket, 1986

Appeal from the Judgment Dated May 12, 1986, by the Superior Court of Pennsylvania, No. 175 Harrisburg, 1985, Reversing the Order Dated February 22, 1985, and Vacating the Judgment Dated March 15, 1985, by the Court of Common Pleas of Dauphin County, Pennsylvania, in No. 995 S 1984, and Remanding for Further Proceedings.

353 Pa.Super. 146, 509 A.2d 377 (1986)

ARGUED: MAY 13, 1987

BLAIR and JULIA CUNNINGHAM,
Administrators of the ESTATE
of KATHLEEN B. CUNNINGHAM,
deceased; and all others
similarly situated,
Appellees

v.

INSURANCE COMPANY OF
NORTH AMERICA,
Appellant

OPINION OF THE COURT

MR. JUSTICE FLAHERTY

FILED: AUGUST 14, 1987

This is an appeal from an order of the Superior Court which reversed an order of the Court of Common Pleas of

Dauphin County which in turn had revoked certification of a class in a class action proceeding filed against the Insurance Company of North America (hereinafter INA). The class action proceeding had been instituted by Blair and Julia Cunningham, appellees herein, seeking recovery of post-mortem work loss benefits on behalf of their daughter's estate and on behalf of the estates of all other INA insureds who had been fatally injured in automobile accidents after the effective date of the No-Fault Motor Vehicle Insurance Act (Act of July 19, 1974, P.L. 489, No. 176, 40 P.S. §1009.101 et seq., repealed by the Act of February 12, 1984, P.L. 26, No. 11, §8(a)).

The accident responsible for the death of the Cunninghams' daughter occurred in January of 1979, and, more than five years later, in March of 1984, the instant action was filed. In response thereto, INA moved for summary judgment on grounds the claims of the representative plaintiffs were barred by the statute of limitations set forth in the No-Fault Act, 40 P.S. §1009.106(c), which provides that suits must be brought within, at most, four years from the date of the accident. See *Kamperis v. Nationwide Insurance Co.*, 503 Pa. 536, 469 A.2d 1382 (1983) (discussion of statute of limitations governing actions for post-mortem work loss benefits). The trial court determined that the individual claims of the Cunninghams were indeed barred by the statute of limitations but conditionally granted class certification with the proviso that counsel would be required to intervene new class representatives within twenty days. New class representatives were not, however, intervened, and, after the twenty day period and certain extensions granted with respect thereto had expired, the court granted a motion for decertification of the

class.[1] Summary judgment in favor of INA was likewise granted.

An appeal was taken to the Superior Court, whereupon summary judgment was vacated and the order revoking certification of the class was reversed. The basis for the Superior Court's action was its determination that the running of the statute of limitations against the Cunninghams' claim had been tolled during a period in which the Cunninghams had been putative class members in an earlier class action, seeking post-mortem work loss benefits, filed against a group of thirty-one insurance companies, including INA. The latter class action was commenced on November 15, 1979, but, with respect to INA in all but one other in the group of defendant insurance companies, was subsequently dismissed by the trial court on the basis of preliminary objections asserting that the representative plaintiff lacked standing to bring such an action. The Superior Court reversed, holding that adversarial standing was not required, and an appeal was taken to this Court, whereupon on December 30, 1983 the Superior Court's order was reversed and the class action was dismissed as to INA and twenty-nine of the other defendant insurance companies. *Nye v. Erie Insurance Exchange*, 504 Pa. 3, 470 A.2d 98 (1983). The basis for our dismissal of the *Nye* action against INA was that the class representative lacked the necessary standing to assert such a claim since the representative's interests had not been insured by INA.

In holding that the Cunninghams' claim in the instant action was not barred by the statute of limitations, the

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[1] Class certification should not have been granted initially in the absence of there being a viable class representative. Pa.R.C.P. 1702 (3), (4).

Superior Court reasoned that the running of the statute had been tolled for a period of approximately four years, to wit, from the time of commencement of the *Nye* action until its final dismissal by this Court. The issue presented by the instant appeal is, therefore, whether tolling of the statute of limitations occurred so as to prevent the Cunninghams' claim from becoming time-barred.

It is well established that upon the filing of a class action, the statute of limitations is normally tolled for all putative plaintiffs in the class. See *Alessandro v. State Farm Mutual Automobile Insurance Co.*, 487 Pa. 274, 279 n.9, 409 A.2d 347, 350 n.9 (1979) (members of a class which is subsequently decertified "will not be time barred by the statute of limitations, as it is suspended during the time they are allegedly parties to the class action. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), [rehearing denied, 415 U.S. 952 (1974)]."). See also *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350, 103 S.Ct. 2392, , 76 L.Ed.2d 628, 633 (1983) ("The filing of a class action tolls the statute of limitations 'as to all asserted members of the class,' [*American Pipe & Construction Co.*, 414 U.S. at 554, 38 L.Ed.2d at 727].").

Class actions in Pennsylvania emanate from Pa.R.C.P. 1701 et seq. Tolling of the statute of limitations is discussed in the Explanatory Note to Pa.R.C.P. 1701, following that rule's definition of the term "class action." A "class action" is defined in Pa.R.C.P. 1701 as "any action brought by or against parties as representatives of a class until the court by order refuses to certify it as such or revokes a prior certification under these rules." The Explanatory Note following that definition states,

> This definition becomes important in determining the effect of the commencement of a class action as tolling the statute of limitations as to the members of the class other than the named representatives. It carries into effect the decision of the United States Supreme Court in *American Pipe and Construction Company v. State of Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), in which the Court held that the commencement of an action as a class action suspends the applicable statute of limitations during the interim period from commencement until refusal to certify as to all putative members of the class who would have been parties if the action had been certified as such.

Thus, given that the statute of limitations is normally tolled upon the filing of a class action, there would, if this were a typical case, be no question that the statute was tolled during the period when the Cunninghams were putative class members in the earlier class action against INA. A difficulty arises, however, in that the earlier class action, i.e., the *Nye* case, was one in which the representative plaintiff lacked standing to maintain a suit against INA. The narrow issue presented, therefore, is whether that lack of standing negated the tolling effect that would normally have accompanied filing of the *Nye* class action.

It is the contention of INA that, because the representative plaintiff in *Nye* lacked standing to pursue claims against INA, lack of standing rendered that class action a nullity, *ab initio*, such that it could not have had the effect of tolling the statute of limitations, and INA asserts that to hold otherwise would be to accord *Nye* an effect that offends constitutional principles of justiciability under Arti-

cle 5 of the Pennsylvania Constitution. Because we hold, on other grounds, that the *Nye* action was not effective to toll the statute of limitations with respect to actions against INA, we do not reach the constitutional issue. See generally *Commonwealth v. Allsup*, 481 Pa. 313, 317, 392 A.2d 1309, 1311 (1978) (resolution of constitutional question should be avoided when there exists a non-constitutional ground for decision).

Statutes of limitations embody important policy judgments that must be taken into account in determining the scope of application of the tolling principle. Those policy judgments include a belief that defendants should be protected against the prejudice of having to defend against stale claims, *Insurance Company of North America v. Carnahan*, 446 Pa. 48, 51, 284 A.2d 728, 729 (1971), as well as the notion that, at some point, claims should be laid to rest so that security and stability can be restored to human affairs, *Schmucker v. Naugle*, 426 Pa. 203, 205-206, 231 A.2d 121, 123 (1967). The defense of the statute of limitations is not a technical defense but rather is a substantial and meritorious one, and has been regarded as favored in the law and as advancing the welfare of society. *Id*.

We do not believe that the principle of tolling, as it has developed under applicable precedents and under Pa.R.C.P. 1701, supra, contemplates that tolling will occur in cases like the present one, where the lack of standing of the class representative in the prior action, *Nye*, was apparent upon the face of the complaint filed therein. Indeed, the complaint filed in *Nye* clearly stated that the representative plaintiff was not an insured of INA, and it contained no allegation that any actions attributable to INA caused injury to the representative plaintiff. Under such

circumstances, it could not have been more apparent that requirements of standing were not satisfied. See *William Penn Parking Garage Inc. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) (plaintiff who is not aggrieved by conduct lacks standing to challenge it); *McMonagle v. Allstate Insurance Co.*, 460 Pa. 159, 331 A.2d 467 (1975) (plaintiff in class action who has not suffered an injury from the challenged conduct of a defendant cannot maintain the class action against that defendant).

In *American Pipe & Construction Co.*, supra, the decision relied upon by *Crown, Cork and Seal Co.*, supra, *Alessandro*, supra, and the Explanatory Note to Pa.R.C.P. 1701, it was inferred that tolling should not occur in cases where the class representative lacked standing. Although *American Pipe & Construction Co.* did not involve a class representative who lacked standing, but rather was a decision invoking the principle of tolling for a class action that had been decertified for lack of numerosity in the plaintiff class, the Supreme Court of the United States stated as follows regarding possible limits on the scope of application of the tolling principle:

> We hold that . . . at least where class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of all members is impracticable," the commencement of the original class suit tolls the running of the statute for all purported members of the class . . . As the Court of Appeals was careful to note in the present case, "Maintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class . . . *not for lack of standing of the representative*, or for reasons of bad faith or frivolity." 473 F.2d, at 584. (Footnote omitted.)

414 U.S. at 552-553, 38 L.Ed.2d at 726 (emphasis added). Indeed, where a class action has been dismissed on the basis of lack of standing, considerations which supported invocation of the rule of tolling in other contexts are outweighed by factors particular to the situation presented.

Application of the rule of tolling in *American Pipe* and its progeny was based upon a need to promote efficiency and economy of litigation, recognizing that, unless tolling were afforded, class members would not be able to rely on the existence of the suit to protect their rights. See *Crown, Cork & Seal Co.*, 462 U.S. at 350, 76 L.Ed.2d at 633-634. Thus, were it not for tolling, class members might be forced to intervene or take other actions prior to the running of the statute of limitations to ensure that their rights would not be extinguished in the event that class certification were denied.

The potential for abuse of the tolling rule has, however, been recognized since the time of its inception. As Justice Blackmun stated in his concurring opinion in *American Pipe*, "Our decision . . . must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." 414 U.S. at 561, 38 L.Ed.2d at 731. Similarly, Justice Powell, joined by Justice Rehnquist (now Chief Justice) and Justice O'Connor, stated as follows while concurring in *Crown, Cork & Seal Co.*, "it seems important to reiterate the view expressed by Justice Blackmun in *American Pipe* [citing quote, supra] . . . The tolling rule of *American Pipe* is a generous one, inviting abuse." 462 U.S. at 354, 38 L.Ed.2d at 636.

In the instant case, it is to be noted that counsel for the Cunninghams is the same counsel as filed the class ac-

tion in *Nye*, and in the *Nye* complaint there appears an admission that counsel's purpose in bringing suit against thirty-one insurance companies even though he represented an insured of only one of them was that he sought to toll the statute of limitations for all carriers, inasmuch as counsel believed that many potential plaintiffs would not otherwise act upon their rights. We regard such an action as a clear abuse of the goals of class action procedures. The procedures do not exist to sanction what would be regarded by many as a course of officious intermeddling on the part of counsel, who, motivated by concern for plaintiffs who would not otherwise file suits, has embarked on a course of initiating litigation on behalf of those who have slept on their rights. Indeed, this case presents a most compelling example of tactics employed to subvert the legislative intent embodied in the statute of limitations, and the rules governing tolling will not be extended to give effect to such tactics.

It is argued that, for purposes of tolling, it should make no difference whether the representative plaintiff had standing to maintain a class action, in that even if standing were lacking the defendant would be put on adequate notice of the existence of claims against him. See *Crown, Cork & Seal Co.*, 462 U.S. at 353, 76 L.Ed.2d at 635 (*one* of the purposes of limitations periods is to assure prompt notice to defendants of the need to preserve evidence and gather necessary witnesses). Such an argument, however, rests upon the faulty premise that the legislature, in enacting statutes of limitations, intended merely to assure that defendants would be given notice, within a given time frame, that there are individuals who *might*, if they were aware of their rights and desirous of pursuing them, bring actions against such defendants.

As stated in *Crown, Cork & Seal Co.*, 462 U.S. at 352, 76 L.Ed.2d at 635, "Limitations periods are intended to put defendants on notice of adverse claims and to prevent plaintiffs from sleeping on their rights. . . ." When a complaint is filed by one who, upon the face of the pleadings, is patently without standing, it cannot be said that the defendant has been given notice of an *actual* adverse claim; rather, the defendant has been advised only of the possibility of such a claim, a fact of which the defendant may well have been aware even in the absence of a complaint having been filed. In such a case, the defendant has been given notice only of a palpably non-justiciable claim, for, under the precedents governing standing, discussed supra, it is clear that the action must be dismissed. The *Nye* case constitutes a prime example, inasmuch as the trial court in ruling on preliminary objections to the complaint determined from the outset that, on the face of the pleadings, the representative plaintiff lacked standing to maintain suits against insurance companies with which his interests had not been insured.

Providing notice of the mere possibility of an actionable claim, by filing a patently non-justiciable class action suit, cannot be regarded as sufficient to toll the statute of limitations. To hold otherwise would be to render the statute of limitations so diluted in its effect as to skirt the clear legislative policy expressed therein, and would encourage plaintiffs to sleep on their rights in the hope that officious intermeddlers, who lack standing, will institute actions on their behalf.

The argument has been advanced that, by not applying the tolling principle in the context of this case, the utility of class action suits will be completely vitiated, render-

ing it necessary in every case for putative plaintiffs to intervene or file their own actions because of an inability to rely on the standing of other representative plaintiffs. Such an argument misconstrues the impact which this decision will have upon the status of class action litigation, for the most direct effect will be to discourage plaintiffs from filing suits in cases where they lack standing, thus reducing the incidence of cases where standing may be questioned. Only in a comparatively small number of cases will it be necessary, therefore, for purported class members to take actions to ensure that their rights are not extinguished as a result of apparent defects in the standing of representative plaintiffs. Further, it should be emphasized that the present case is one where the lack of standing of the representative plaintiff in *Nye* was plainly discernible on the face of the pleadings, and where the trial court in *Nye* ruled from the outset, at the preliminary objections stage, that standing was absent. Under these circumstances, to accord *Nye* a tolling effect would not be warranted.

Order of the Superior Court reversed.

Mr. Justice LARSEN files a Dissenting Opinion.

DATED: AUGUST 14, 1987
JUDGMENT ENTERED
s/ Mildred E. Williamson
DEPUTY PROTHONOTARY

[J-107-87]

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 52 Middle District
Appeal Docket, 1986

Appeal from the Judgment Dated May 12, 1986, by the Superior Court of Pennsylvania, No. 175 Harrisburg, 1985, Reversing the Order Dated February 22, 1985, and Vacating the Judgment Dated March 15, 1985, by the Court of Common Pleas of Dauphin County, Pennsylvania, in No. 995 S 1984, and Remanding for Further Proceedings.

353 Pa.Super. 146, 509 A.2d 377 (1986)

ARGUED: MAY 13, 1987

BLAIR and JULIA CUNNINGHAM,
Administrators of the ESTATE
of KATHLEEN B. CUNNINGHAM,
deceased; and all others
similarly situated,

Appellees

v.

INSURANCE COMPANY OF
NORTH AMERICA,

Appellant

DISSENTING OPINION

JUSTICE ROLF LARSEN

FILED: AUGUST 14, 1987

I dissent.

Dissenting Opinion

Appellant, Insurance Company of North America (INA), framed the issue it presented to this Court as follows:

> Did the filing of a class action over which no court had jurisdiction because the named plaintiffs lacked standing to sue nevertheless toll the statute of limitations for claims filed after the statute otherwise would have run?

The thrust of appellant's argument is that lack of standing in a class action proceeding goes to the essence of a court's jurisdiction and that lack of standing renders a class action a nullity from the outset. This is *not* the law of this Commonwealth. In *Jones Memorial Baptist Church v. Brackeen*, 416 Pa. 599, 602, 207 A.2d 861, 863 (1965), this Court specifically rejected a challenge to the lower court's *jurisdiction* to hear a case on the basis of the plaintiff's purported lack of standing, stating simply: "[w]hether a plaintiff has standing . . . does not involve a question of jurisdiction." *See also Jackson v. Centennial School District*, Pa. , 501 A.2d 218 (1985) (Larsen, J., dissenting) (discussing confusion engendered by use of term "jurisdiction" whenever a court fails to entertain an action for any reason.) On this ground alone, I would have dismissed this appeal as having been improvidently granted.

Further, appellant and the majority accord undue significance to the dicta in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713, *reh. denied*, 415 U.S. 952 (1974), from which the majority infers that tolling of the statute of limitations "should not occur in cases where the class representative lacked standing." Maj. op. at 8.

The source of this "rule" of law, as cited by the Court of Appeals in *Utah v. American Pipe & Construction Co.*, 473 F.2d 580 (9th Cir. 1973), is *Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176 (W.D. La. 1970). The court in *Hobbs* refused to permit untimely intervention in a class action suit where the named representative lacked standing in his own right and as a member of the class he purported to represent to challenge the issuance of municipal bonds. The *Hobbs* court found that this cause of action was governed by a *peremptive* period of limitation, which period could not, under any circumstance, be tolled or suspended.[1] Peremptive periods of limitation were distinguished by the *Hobbs* court from *prescriptive* periods in this way:

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[1] The Louisiana Constitution provides, in pertinent part:

> If the validity of any election, special tax or bond issue authorized or provided for, held under the provisions of this section, is not raised within the sixty (60) days herein prescribed, the authority to issue the bonds, the legality thereof and of the taxes necessary to pay the same shall be conclusively presumed, and no court shall have authority to inquire into such matters.

La.Const. Art. 14, §14(n).

Compare the applicable statute of limitations set forth in our No-fault Act as follows:

> If no-fault benefits have not been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable diligence should have known, that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If no-fault benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than two years after the last payment of benefits.

40 P.S. §1009.106(c)(1) (repealed).

> 'The difference between prescription and peremption is that the former simply bars the remedy whereas, in the latter, *time is made of the essence of the right granted*.'
>
> . . . . .
>
> Had this case dealt with a simple prescriptive period, we may have been inclined to hold that institution of a class action by an improper party interrupted the running of prescription so as to allow a later, proper plaintiff with appropriate standing, to prosecute the suit.

49 F.R.D. at 179 (emphasis added).[2] Such precedent does not establish a firm foundation for the majority's holding today.

We must keep in mind that our own rules of procedure define a class action as "any action brought by or against parties as representatives of a class *until* the court by order refuses to certify it as such or revokes a prior

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[2] In *Sachritz v. Pennsylvania National Mutual Casualty Insurance Co.*, 500 Pa. 167, 455 A.2d 101 (1982), this Court drew an analogy between the no-fault statute of limitations and the limitations on traditional tort actions for personal injuries. As such, the limitations period set forth in the No-fault Act can be considered a "pure" statute of limitations (or a "prescriptive" limitations period) and not a "special" (or "peremptive") statute of limitations. In *Metropolitan Edison Co. v. Pennsylvania Public Utility Commission*, 62 Pa.Commw. 460, 437 A.2d 76, 84 (1981) (Petition for Allowance of Appeal denied February 23, 1982), Commonwealth Court aptly described these terms as follows:

> A "pure" statute of limitations operates only to bar a remedy, and does not affect the substantive existence of a legal right or power. A special limitation, by contrast, is an integral, substantive element of the right or power in question; the right or power cannot exist in scope beyond the special limitation.

certification." Pennsylvania Rules of Civil Procedure Rule 1701 (emphasis added). This definition tracks the language of *Bell v. Beneficial Consumer Discount Co.*, 465 Pa. 225, 348 A.2d 734 (1975), where this Court stated that "[t]he class is in the action until properly excluded." Explanatory Note to Rule 1701. Appellees herein, Blair and Julia Cunningham, were unnamed members of the class involved in *Nye v. Erie Insurance Exchange*, 504 Pa. 3, 470 A.2d 98 (1983),[3] and I would hold that the statute of limitations was tolled as to their cause of action from the date the class action complaint in *Nye* was filed and *until* this Court found that Nye lacked class action standing with respect to all defendants except Erie Insurance Exchange on December 30, 1983.

The purposes to be served by limitations periods and the tolling principle in class actions would not be violated by extending the tolling principle to this case. The validity of class members' claims depends on their inherent merits; it does not rise and fall with their putative representative.

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[3] Nye's complaint alleged:

> The class of plaintiffs includes all previously employed Pennsylvania residents who were insured by any of the defendants under No-Fault insurance coverage and who sustained a fatal injury within the past two years or whose estate or relative received any no-fault payments whatsoever as a result of decedents' death during the past two years and their executors, administrators, relatives, etc.

Nye's Class Action Complaint at 6. *Nye v. Erie Insurance Exchange*, *supra*. Appellees brought the instant action as administrators of the estate of their daughter, Kathleen Cunningham, who died as the result of a motor vehicle accident occurring on January 25, 1979. At the time of her death, Kathleen was a Pennsylvania resident, who was employed as a schoolteacher, and was a named insured on a no-fault automobile insurance policy issued by INA.

The fact that Nye lacked standing meant only that he could not represent those class claims, not that no one could, or that his individual claim or the claims of his class were invalid. Appellant had notice sufficient to determine both the subject matter and size of the prospective litigation on the day that the complaint was filed in *Nye*. Contrary to what the majority finds, it was *not* patently clear from the face of Nye's complaint that Nye lacked standing to bring a cause of action against appellant herein. Standing has been referred to as one of "the most amorphous concepts in the entire domain of public law." *Flast v. Cohen*, 392 U.S. 83, 99, 88 S.Ct. 1942, 1952, L.Ed.2d (1968). Two Superior Court judges found that Nye *did* have standing to pursue the action against all defendant insurance companies, including INA. *Nye v. Erie Insurance Exchange*, 307 Pa.Super. 464, 453 A.2d 677 (1982), *rev'd*, 504 Pa. 3, 470 A.2d 98 (1983). Although this Court unanimously determined that Nye lacked standing, this was an arguable legal issue which took four years to resolve.

In the interim, appellees, members of the class in *Nye*, properly refrained from filing an individual action, thereby promoting the efficiency and economy of litigation envisioned by our class action rules. The result of the majority's position, on the other hand, will be to encourage the filing of numerous duplicative complaints across the Commonwealth as unnamed members of a class seek to preserve their rights in the event that the class action is dismissed or decertified for any reason other than lack of numerosity, commonality, or the ability of the representative to protect the interests of the class.

The majority takes note of the fact that counsel for the appellees herein "is the same counsel as filed the class ac-

tion in *Nye*," maj. op. at 10, and concludes therefrom that counsel has acted as an officious intermeddler, abused the goals of class action procedures, and employed subversive tactics. Maj. op. at 10-11. I disagree. I would note for the record that Pennsylvania insurers not only failed to inform their insureds that work loss benefits were available under the No-fault Act,[4] Pennsylvania No-fault Motor Vehicle Insurance Act, Act of July 19, 1974, P.L. 489, No. 176, 40 P.S. §§1009.101-1009.701, since repealed, but also contested payment of these benefits in numerous court actions and appeals. *See, e.g., Freeze v. Donegal Mutual Insurance Co.*, 504 Pa. 218, 470 A.2d 958 (1983) (estate of victim entitled to work loss benefits); *Klopp v. Allstate Insurance Co.*, 334 Pa.Super. 162, 482 A.2d 1133 (1984) (decedent on total disability entitled to work loss benefits); *Antanovich v. Allstate Insurance Co.*, 320 Pa.Super. 322, 467 A.2d 345 (1983) (work loss benefits must be paid in lump sum), *aff'd*, 507 Pa. 68, 488 A.2d 571 (1985); *Shomper v. Aetna Life & Casualty Co.*, 309 Pa.Super. 97, 454 A.2d 1101 (1982) (earlier decisions regarding work loss benefits were to be applied retroactively and such benefits were payable to decedent on welfare at time of accident); *Minier v. State Farm Mutual Automobile Insurance Co.*, 309 Pa.Super. 53, 454 A.2d 1078 (1982) (retired person on pension is entitled to work loss benefits). Thus, counsel's actions were a proper attempt to prevent clear abuses of the No-fault Act by the insurance industry on behalf of the industry's insureds.

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[4] For example, appellees in the instant action filed an affidavit in which they stated "[w]e were not told that our decedent's estate had a claim for No-fault work loss benefits." Reproduced Record at 273a. They also stated that they were originally informed of this right to work loss benefits by an attorney *not* involved in the *Nye* case who referred them to their present counsel.

No. 87-766

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

BLAIR and JULIA CUNNINGHAM, Administrators of the Estate of Kathleen B. Cunningham, Deceased; and all others similarly situated,
Petitioners,

v.

INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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PARTIES TO THE PROCEEDING

The named parties to this proceeding are Blair and Julia Cunningham, as administrators of the Estate of Kathleen B. Cunningham (deceased), and the Insurance Company of North America ("INA").

INA's ultimate parent company is CIGNA Corporation, a publicly traded company. INA is a wholly-owned subsidiary of INA Financial Corporation, which is a wholly-owned subsidiary of INA Corporation. In turn, INA Corporation is a wholly-owned subsidiary of CIGNA Holdings, Inc., the company directly owned by CIGNA Corporation. INA's parents have varying ownership interests in hundreds of domestic and foreign companies, including Connecticut General Corporation and Connecticut General Life Insurance Company, and a full listing of those companies will be provided if the Court requests. Other than wholly-owned subsidiaries, INA's own subsidiaries and affiliates are CIGNA Venture Capital, Incorporated (Delaware); INA County Mutual Insurance Company (Texas); Compagnie Financiere INA (France); CIGNA France Compagnie d'Assurances (France); CIGNA Sicav 1 (France); La Nouvelle, S.A. (France); Compagnie d'Assurances Colina S.A. (Ivory Coast); and INAMEX S.A. (Mexico). Through a wholly-owned subsidiary, INA owns a sixty percent interest in AFIA, an unincorporated association (of which the balance is owned by a wholly-owned subsidiary of INA Financial Corporation) which has indirect interests in foreign insurance and insurance-related companies.

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IN THE

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BLAIR and JULIA CUNNINGHAM, Administrators of the Estate of Kathleen B. Cunningham, Deceased; and all others similarly situated,
Petitioners,

v.

INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Respondent Insurance Company of North America ("INA") respectfully submits that the petition for a writ of certiorari should be denied. The decision by the Supreme Court of Pennsylvania correctly applied the law of Pennsylvania to this case, and petitioners have raised no question of federal law that merits review of that decision by this Court.

STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by petitioner, the decision below involved application of Section 106(c) of the Pennsylvania No-Fault Motor Vehicle Insurance Act, Act No. 176, 1974 Pa. Laws 489, 501-02, 40 Pa.

Stat. Ann. § 1009.106(c) (repealed 1984), the pertinent subsections of which provided:

> *Time limitations on actions to recover benefits.*—
>
> (1) If no-fault benefits have not been paid for loss arising otherwise than from death, an action therefor may be commenced not later than two years after the victim suffers the loss and either knows, or in the exercise of reasonable diligence should have known, that the loss was caused by the accident, or not later than four years after the accident, whichever is earlier. If no-fault benefits have been paid for loss arising otherwise than from death, an action for further benefits, other than survivor's benefits, by either the same or another claimant, may be commenced not later than two years after the last payment of benefits.
>
> (2) If no-fault benefits have not been paid to the deceased victim or his survivor or survivors, an action for survivor's benefits may be commenced not later than one year after the death or four years after the accident from which death results, whichever is earlier. If survivor's benefits have been paid to any survivor, an action for further survivor's benefits by either the same or another claimant may be commenced not later than two years after the last payment of benefits. If no-fault benefits have been paid for loss suffered by a victim before his death resulting from the injury, an action for survivor's benefits may be commenced not later than one year after the death or six years after the last payment of benefits, whichever is earlier.

STATEMENT OF THE CASE

This was an action to recover damages from respondent Insurance Company of North America ("INA") for an alleged breach of an insurance policy issued pursuant to the Pennsylvania No-Fault Motor Vehicle Insurance Act, Act No. 176, 1974 Pa. Laws 489, 40 Pa. Stat. Ann. §§ 1009.101 *et seq.* (repealed 1984). The policy was issued to petitioners Blair and Julia Cunningham, and it covered their daughter, Kathleen Cunningham. On January 26, 1979, Kathleen Cunningham died as a result of injuries sustained in an automobile accident, and petitioners are the administrators of her estate.

Under the No-Fault Act, as ultimately interpreted by the Pennsylvania courts, the estate of an insured who died in an automobile accident may be entitled to recover benefits for loss of income ("work loss") resulting from the accident. *See generally Allstate Insurance Co. v. Heffner*, 491 Pa. 447, 421 A.2d 629 (1980). On March 29, 1984, more than five years after the accident that caused Kathleen Cunningham's death, petitioners brought this state court class action against INA for payment of work loss benefits allegedly due under the statute. But under Section 106(c) of the No-Fault Act, an action for work loss benefits following death in an automobile accident may be filed no more than four years after the accident. *See Kamperis v. Nationwide Insurance Co.*, 503 Pa. 536, 469 A.2d 1382 (1983). Since petitioners sued more than five years after the accident, INA asserted that statute of limitations as a defense.

In response, petitioners argued that their claims against INA were timely because the statute of limitations in the No-Fault Act had been tolled or suspended by the filing of an earlier state court class action entitled *Nye v. Erie Insurance Exchange*. In that case, the estate of Karen L. Nye, a victim of a fatal automobile accident

who had been insured by Erie Insurance Exchange (a company having no relation to INA), sued Erie for failure to pay work loss benefits under the statute. The action was filed on November 15, 1979, and it purported to cover claims arising during the preceding two years — that is, as far back as November 15, 1977. Kathleen Cunningham's accident had occurred during that time period, but petitioners were not named as plaintiffs in *Nye*; at that time, petitioners had not retained Nye's counsel to represent them.

The complaint in *Nye* named as defendants 30 insurance companies other than Erie, including INA, even though Karen Nye had not been insured by any of those companies; and it sought payment of work loss benefits on behalf of a class of estates of those companies' insureds. As acknowledged in the petition for certiorari (at 6), Nye's counsel named the other 30 insurance companies as defendants because he wanted to stop the statute of limitations from running in their favor on any claim for work loss benefits that might be asserted against them in the future. *See* App. 9a (*Nye* Complaint ¶ 17); 43a-44a (opinion below). The trial court in *Nye* dismissed the action against INA and the other defendants except Erie because the *Nye* plaintiff had no standing to sue them. Although the Pennsylvania Superior Court reversed that decision, the Supreme Court of Pennsylvania, in a further appeal, sustained the dismissal. *See Nye v. Erie Insurance Exchange*, 102 Dauph. Co. [Pa.] Rep. 308 (C.P. 1981), *rev'd*, 307 Pa. Super. 464, 453 A.2d 677 (1982), *rev'd in relevant part*, 504 Pa. 3, 470 A.2d 98 (1983). Thus, petitioners, who by 1984 had retained the same lawyer who had represented the plaintiff in *Nye*, argued that the statute of limitations in this case had been tolled by the filing of the earlier state court class action in *Nye* even though neither they nor any other INA insureds had been named as plaintiffs in that case and even though *Nye* had been dismissed

with respect to INA because no *Nye* plaintiff had standing to sue INA.

The trial court rejected petitioners' tolling argument and entered summary judgment for INA on the ground that the statute of limitations had run. App. 19a-20a, 23a. The Superior Court reversed, relying on its decision in *Miller v. Federal Kemper Insurance Co.*, 352 Pa. Super. 581, 508 A.2d 1222 (1986), that the *Nye* class action tolled the statute of limitations even though it was jurisdictionally defective for lack of standing. App. 29a-30a. In the decision below, the Supreme Court of Pennsylvania reversed the Superior Court and held that *Nye* did not toll the statute of limitations and that summary judgment therefore had been correctly entered in favor of INA. App. 36a-46a.

The Supreme Court of Pennsylvania reiterated in its decision that, under Pennsylvania law, the filing of a class action may toll the running of a statute of limitations for putative members of the class. App. 39a-40a. It held, however, that tolling does not occur "in cases like the present one, where the lack of standing of the class representative in the prior action, *Nye*, was apparent upon the face of the complaint filed therein." App. 41a. The court noted that the lack of standing to sue INA in *Nye* was patent and that petitioners' counsel had sued INA in *Nye* solely to toll the statute of limitations for future claims. App. 41a-42a, 43a-44a. Referring to that tactical objective, the court stated (App. 44a):

> We regard such an action as a clear abuse of the goals of class action procedures. The procedures do not exist to sanction what would be regarded by many as a course of officious intermeddling on the part of counsel, who, motivated by concern for plaintiffs who would not otherwise file suits, has embarked on a course of initiating

> litigation on behalf of those who have slept on their rights. Indeed, this case presents a most compelling example of tactics employed to subvert the legislative intent embodied in the statute of limitations, and the rules governing tolling will not be extended to give effect to such tactics.

The court rejected petitioners' argument that tolling should be permitted because the *Nye* action gave INA notice of claims against it, observing that "a patently non-justiciable class action suit" does no more than give notice of "the mere possibility of an actionable claim," which is insufficient to toll the statute. App. 45a. It also rejected the argument that a failure to permit tolling would invite intervention by putative class members in a large number of cases, emphasizing that its decision was based on such egregious facts as a patent lack of standing in the first case and dismissal of that case for lack of standing at the pleadings stage. App. 46a. The court based its decision on Pennsylvania law. *See* App. 39a-41a.

REASONS FOR DENYING THE WRIT

I. THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION OR OTHER IMPORTANT CONSIDERATIONS WARRANTING REVIEW BY THIS COURT.

The petition for certiorari should be denied because this case presents no special or important considerations that warrant review by this Court.

The statute of limitations question decided by the court below was entirely one of Pennsylvania law. It disposed of a state law cause of action for an alleged breach of an insurance policy and violation of a repealed Pennsylvania statute regarding automobile insurance — a cause of action having no federal basis. The court applied a Pennsylvania statute of limitations, Section 106(c) of the No-Fault Act, that can have no federal application. In considering petitioners' tolling argument, the court considered the effect of a Pennsylvania rule of civil procedure dealing with class actions within the Commonwealth, a rule that does not apply outside of the Pennsylvania state court system. The court below formulated and applied a rule of tolling to govern class actions in the Pennsylvania courts, and its rule is entirely a creature of Pennsylvania law.

The petition asks this Court to reverse the Pennsylvania Supreme Court's state law holdings. It complains that the state court misconstrued its own class action rules, as well as state rules governing statutory construction. Pet. at 13-15. Petitioners even complain that the Supreme Court of Pennsylvania — the highest judicial authority in the Commonwealth — has reversed or overruled decisions by the Superior Court of Pennsylvania, an inferior state tribunal, and they ask this Court to

intercede. *See id.* at 23-24. Clearly, petitioners misunderstand this Court's role, for, as the Court has observed many times, "We have no authority to review state determinations of purely state law." *International Longshoremen's Association v. Davis*, 476 U.S. __, 106 S. Ct. 1904, 1910 (1986). *See Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

To avoid this limitation, petitioners suggest that this case is appropriate for review because the decision below conflicts with this Court's decisions in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), and *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983). *See* Pet. at 15-18. As explained in the next section of this brief, there is no conflict. But even if there were a conflict, it would not be a reason for review by this Court. *American Pipe, Crown, Cork & Seal*, and the other federal decisions discussing tolling were decided under federal statutes and court rules; they presented no questions of federal constitutional law. Accordingly, the federal decisions are not binding on a state court considering the same issues under state law. *See, e.g., Fletcher v. Weir*, 455 U.S. 603 (1982) (per curiam). The court below was free to follow this Court's tolling decisions (as, in fact, it did (*see, e.g.*, App. 42a-43a)), or to ignore them altogether. Its choice was a matter of state law, and it presents no cause for review by this Court. *See International Longshoremen's Association, supra*, 106 S. Ct. at 1910 ("Nor do we review federal issues that can have no effect on the state court's judgment").

As another basis for certiorari, petitioners attempt to manufacture a federal question by referring periodically to some sort of violation of federal due process and equal protection rights, but their constitutional argument is confused and unreasoned. The due process contention

apparently is related to petitioners' persistent characterization of the decision below as "ad hoc," "unprecedented," "retroactive," and "unpredictable." *See, e.g.*, Pet. at i, 10. But there is nothing arbitrary or otherwise improper about the Pennsylvania Supreme Court's decision. The court's holding that a plaintiff may not misuse the class action process to subvert rules of standing and statutes of limitations did no more than to apply long-standing principles of justiciability, repose, ethical conduct, and judicial administration, and (as discussed in the next section of this brief) was fully consistent with other case law addressing this issue. The holding has general application to all similar cases in the Commonwealth. Pennsylvania certainly has a legitimate interest in curbing abuses of its procedures and in putting an end to stale claims, and the well-reasoned decision by the court below forbidding abuse of class actions to circumvent limitation rules was rationally related to attainment of that objective. Accordingly, there was no due process violation, for principles of due process afford the states broad latitude in framing their policies of repose. *See generally Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945); *Montagino v. Canale*, 792 F.2d 554 (5th Cir. 1986); *Braswell v. Flintkote Mines, Ltd.*, 723 F.2d 527 (7th Cir. 1983), *cert. denied*, 467 U.S. 1231 (1984).

Petitioners' equal protection argument is even less cogent. Petitioners assert that the decision below somehow discriminates against a class of persons who will be barred from recovery because the statute of limitations has run on their claims. Petitioners suggest that some sort of invidious discrimination has been committed against that group while other insurance claimants have been permitted to recover because they "employed knowledgeable lawyers" who brought suit at an earlier

date. Pet. at 8, 25, 29. Of course, petitioners are completely correct that there is a distinction between persons who sued within the limitations period and persons who did not, but that distinction hardly gives rise to a viable equal protection claim. The Pennsylvania statute of limitations and the decision below that enforced it are completely rational means of attaining Pennsylvania's legitimate objectives of ending stale claims and preventing litigation abuses. Such rational statutes and tolling provisions do not deprive anyone of equal protection of the laws. *See generally G.D. Searle & Co. v. Cohn*, 455 U.S. 404 (1982).

At bottom, the petition for certiorari is just an emotional, bombastic attack on the court below and its decision, based on the asserted (and incorrect) premise that petitioners have some sort of superior equitable entitlement to a decision in their favor. The petition is replete with misstatements that have no support in the record and vituperative assertions of insurers' misconduct that have no relation to any acts of INA. Most of the petition is merely a rhetorical diversion from the serious abuses discussed by the court below. Those rhetorical arguments are beside the point and require no further discussion here. The court below was fully within its authority in entering its decision, and there is no ground for this Court to review that decision. "This Court has no supervisory jurisdiction over state courts." *Chandler v. Florida*, 449 U.S. 560, 570 (1981). Since the decision below was based entirely on Pennsylvania law and raises no federal constitutional question of any merit, the petition for certiorari should be denied.

II. THE HOLDING BELOW THAT A STATUTE OF LIMITATIONS CANNOT BE TOLLED BY THE DELIBERATE FILING OF A PATENTLY DEFECTIVE CLASS ACTION WAS CORRECT AND WAS FULLY CONSISTENT WITH EXISTING PRECEDENT.

Even if there were some basis for federal review of this case, certiorari would be unwarranted because the decision below is correct and fully consistent with the decisions of this Court and other courts dealing with the tolling of statutes of limitations by the filing of class actions.

As the court below emphasized, the *Nye* class action was patently defective insofar as it sought to assert claims against INA. No *Nye* plaintiff was aggrieved by any conduct of INA; petitioners were not named parties in the *Nye* action. Since no one had standing to sue INA, the action was subject to dismissal at the outset, and, in fact, that is what occurred. *See generally Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974) (standing requirement for federal class representative); *McMonagle v. Allstate Insurance Co.*, 460 Pa. 159, 331 A.2d 467 (1975) (standing requirement for Pennsylvania class representative). Nevertheless, the complaint named INA as a defendant in a deliberate attempt to stop the statute of limitations from running on claims against INA. App. 9a, 43a-44a; Pet. at 6.

In this Court's leading decision on the tolling effect of class actions, *American Pipe*, *supra*, 414 U.S. 538, the Court specifically noted that it was not dealing with a contention that tolling resulted from a class action filed without standing. 414 U.S. at 553. It said that tolling would occur only for class members "who would have been parties had the suit been permitted to continue as a class action" (*id.* at 554), a qualification that could be

met in *Nye* only by insureds of Erie Insurance Exchange, not those of INA. The Court said that "a named plaintiff who is found to be representative of a class" must provide notice through the class suit of "the potential plaintiffs who may participate in the judgment." *Id.* at 554-55. But no INA insured was a representative of the *Nye* class, and, as the court below persuasively explained (App. 44a-45a), the *Nye* suit gave INA no notice of an actual adverse claim at all. This Court has adhered to the *American Pipe* requirements in its later decisions, particularly *Crown, Cork & Seal, supra*, 462 U.S. 345. Thus, the decision below holding that *Nye* did not toll the statute of limitations with respect to INA was fully consistent with the tolling precedents in this Court. *See also Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965) (requirement that first action be in "court of competent jurisdiction" to toll statute for later action).

Moreover, in his concurring opinion in *American Pipe*, Justice Blackmun warned that the Court's decision in that case "must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights." 414 U.S. at 561. Justices Powell, Rehnquist, and O'Connor repeated this warning in *Crown, Cork & Seal, supra*, 462 U.S. at 354. The lower federal courts have adhered to this view by refusing to apply the tolling doctrine when a danger of abuse is present. *See, e.g., Korwek v. Hunt*, 827 F.2d 874 (2d Cir. 1987); *Salazar-Calderon v. Presidio Valley Farmers Association*, 765 F.2d 1334, 1351 (5th Cir. 1985), *cert. denied*, 475 U.S. 1035 (1986).

This case fits squarely within the abusive situation of which Justice Blackmun warned in *American Pipe*. By refusing to permit tolling through such a blatant

effort to abuse the class action procedure, the court below was in complete accord with the views of this Court and other courts regarding the limitations of class tolling. The decision below was neither novel nor unprecedented, and there is nothing about the decision that calls for this Court's review.

CONCLUSION

The petition for certiorari presents no issue that merits the time or attention of the Supreme Court of the United States. It should be denied.

Respectfully submitted,

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